BellSouth Telecommunications, Inc.
Legal Department
1600 Williams Street
Suite 5200
Columbia, SC 29201

patrick.turner@bellsouth.com

Patrick W. Turner
General Counsel-South Carolina

803 401 2900
Fax 803 254 1731

November 2, 2006

The Honorable Charles Terreni
Chief Clerk of the Commission
Public Service Commission of South Carolina
Post Office Drawer 11649
Columbia, South Carolina 29211

Re: Joint Petition for Arbitration of NewSouth Communications Corp., NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III LLC, and Xspedius [Affiliates] an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended
Docket No. 2005-57-C

Dear Mr. Terreni:

Enclosed for filing are the original and one (1) copy of BellSouth Telecommunications, Inc.'s Response to Joint Petitioners' Petition for Reconsideration in the above-referenced matter. By copy of this letter, I am serving all parties of record with this response as indicated on the attached Certificate of Service.

Sincerely,

Patrick W. Turner

PWT/nml
Enclosure
cc: All Parties of Record
DM5 # 655884

THIS DOCUMENT IS AN EXACT DUPLICATE OF THE E-FILED COPY SUBMITTED TO THE COMMISISON IN ACCORDANCE WITH ITS ELECTRONIC FILING INSTRUCTIONS.

BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

In the Matter of	)	
	)	
Joint Petition for Arbitration of	)	
	)	
NewSouth Communications, Corp.,	)	Docket No. 2005-57-C
NuVox Communications, Inc.	)	
KMC Telecom V, Inc., KMC Telecom III LLC, and	)	
Xspedius Communications, LLC on Behalf of its	)	
Operating Subsidiaries Xspedius Management Co.	)	
Switched Services, LLC and Xspedius Management Co. of	)	
Charleston, LLC, Xspedius Management Co. of Columbia,	)	
LLC, Xspedius Management Co. Of Greenville,	)	
LLC, and Xspedius Management Co. of Spartanburg, LLC	)	
	)	
Of an Interconnection Agreement with	)	
BellSouth Telecommunications, Inc.	)	
Pursuant to Section 252(b) of the	)	
Communications Act of 1934, as Amended	)	
	)	

BELLSOUTH'S RESPONSE TO JOINT PETITIONERS' PETITION FOR RECONSIDERATION

BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits this Response to the Petition for Reconsideration ("*Petition*") the Joint Petitioners filed on October 23, 2006. The *Petition* raises few, if any, facts or arguments that have not already been raised in the Joint Petitioners' testimony or Post-Hearing Brief. Rather than repeating all of the arguments that are set forth in its Post-Hearing Brief, therefore, BellSouth will address the more glaring infirmities of the *Petition* in this Response. As explained below, the Commission should deny the *Petition* in its entirety.

Issue 4: What should be the limitation of each Party's liability in circumstances other than gross negligence or willful misconduct? (Agreement GT&C, Section 10.4.1)

The Joint Petitioners accuse the Commission of having "failed to fulfill its role here" when it reached a decision that is consistent with the decisions of the FCC's Wireline Competition Bureau, decisions rendered by at least five other state Commissions that have considered this same issue in companion arbitration dockets, and decisions of at least two state Commissions that have considered this issue in other contexts.[1] As explained below, the Joint Petitioners accusation is unfounded.

The *Petition* quibbles with the Commission's determination that commercial agreements are different from interconnection agreements.[2] The Commission's *Order*, however, carefully explains that this determination is entirely appropriate and consistent with controlling law.[3] Moreover, in addition to the authority discussed in the *Order*, the Tenth Circuit has expressly held that "[a]n interconnection agreement is not an ordinary private contract" and that "[a]n interconnection agreement is not to be construed as a traditional contract but as an instrument arising within the context of ongoing federal and state regulation."[4] Additionally, the Fourth Circuit has acknowledged that

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1 *See Order* at 6-7. The Joint Petitioners seem to suggest that BellSouth may have misrepresented a decision of a Mississippi arbitration panel to be an Order of the Mississippi Commission. *See Petition* at 2, n.2. That suggestion, however, is unfounded. BellSouth's Post-Hearing Brief clearly refers to "an Arbitration Panel appointed by the Mississippi Commission," *see* Brief at 8, and BellSouth's initial citation to that panel decision makes it clear that it is a "Recommendation of the Arbitration Panel of the Mississippi Public Service Commission" that, for convenience, is referred to thereafter as the "Mississippi Order." *Id.* at 8, n. 26. Similarly, in its initial citation to that panel decision, the Commission's *Order* makes it clear that it is a "Recommendation of the Arbitration Panel of the Mississippi Public Service Commission" that, for convenience, is referred to thereafter as the "Mississippi Order." *Order* at 6 n. 24.

2 *See Petition* at 4-5.

3 *See, e.g., Order* at 7-9.

4 *e.spire Commc'ns, Inc. v. New Mexico Pub. Regulation Comm'n*, 392 F.3d 1204, 1207 (10th Cir. 2004)(emphasis added).

interconnection agreements are a "creation of federal law" and are "the vehicles chosen by Congress to implement the duties imposed in § 251."[5] The Commission's determination, therefore, is appropriate and fully supported by controlling law.

This same body of law dispenses with the Joint Petitioners' apparent suggestion that the Commission should disregard South Carolina state and federal court rulings supporting limitation of liability provisions because "the *Pilot* and *Parnell* decisions came many, many years prior to the 1996 Act establishing competition."[6] As the Joint Petitioners acknowledge, retail telecommunications services are less regulated today because competition is flourishing in the marketplace. The Commission's decisions in this arbitration proceeding, however, do not address retail services. Instead, they address wholesale services, wholesale elements, and wholesale relationships that are stringently regulated pursuant to the 1996 Act. Thus, as explained in the Commission's *Order*,[7] the rationale of the *Pilot* and *Parnell* decisions applies with equal force to the Commission's determination of Issue 4.

The Joint Petitioners acknowledge that they can point to no other agreement that contains the liability of limitation provisions they have asked the Commission to adopt, but they claim that they have pointed to "similar" provisions in other agreements.[8] These purportedly "similar" provisions, however, provide for liability limitations in the range of $100,000 to $250,000 per event.[9] In sharp contrast, the language the Joint Petitioners have asked the Commission to adopt would limit their liability to BellSouth to a mere

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5 *Verizon Md., Inc. v. Global NAPS, Inc.*, 377 F.3d 355, 364 (4th Cir. 2004).
6 *See Petition* at 5.
7 *See Order* at 5-6.
8 *Petition* at 4.
9 *Petition* at 3.

$2,700 per event.[10] These two sets of provisions cannot reasonably be described as "similar."

Issue 5: BellSouth Issue Statement: If the CLEC does not have in its contracts with end users and/or tariffs standard industry limitations of liability, who should bear the resulting risks? Joint Petitioners' Issue Statement: To the extent that a Party does not or is unable to include specific limitation of liability terms in all of its tariffs and End User contracts (past, present and future), should it be obligated to indemnify the other Party for liabilities not limited? (GT&C, Section 10.4.2)

The Joint Petitioners' claim that "[t]he Commission's acceptance of BellSouth's argument that there is a specific industry standard for limitation of liability that applies to all carriers is in error."[11] This claim is baffling in light of their own witness's acknowledgment that limiting liability to the provision of bill credits is "probably the current practice" in the industry.[12] Additionally, the Commission's finding is fully supported by the evidence of record cited at page 11 of the *Order*.

The Joint Petitioners also claim that the Commission's decision "severely limits the Joint Petitioners' ability to gain and maintain customers by offering more flexible and commercially reasonable liability terms,"[13] but this claim is not substantiated by any evidence in the record.[14] The Joint Petitioners further speculate that BellSouth incorporates liability provisions into its contract arrangements with end users "that may

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[10] FL Tr. at 180; SC Tr. at 400-401. This is compared to a "limitation" of BellSouth's liability to the Joint Petitioners of more than $8 million. *Id.*

[11] *See Petition* at 8.

[12] *See* Russell Depo. at 82-83; *see also* FL Tr. at 182.

[13] *Petition* at 7-8.

[14] To the contrary, the Joint Petitioners could not identify a single, specific instance where they had to concede limitation of liability language to attract a customer. *See* Joint Petitioners Response to Interrogatory No. 22. In their depositions, each of the Joint Petitioners stated that they were not aware of a specific instance where an end user contract deviated from standard limitation of liability language. *See* Johnson Depo. at 29-30; Falvey Depo. at 33; Russell Depo. at 46. Additionally, the Parties have been complying with this same language in their current agreement, and there has never been a dispute regarding its application, even though the Joint Petitioners have been competing against BellSouth during this time period.

vary from what BellSouth includes in its tariffs to win a customer in the competitive marketplace."[15] The Joint Petitioners, however, presented no evidence to suggest that this speculation is true. Indeed, although she was not aware of any specific CSAs that deviated from BellSouth's tariff language, BellSouth witness Kathy Blake has repeatedly testified that CSAs differ predominantly in price only.[16] In any event, speculation over the contents of BellSouth's CSAs misses the mark; does not constitute credible evidence; and does not undermine the Commission's sound ruling on this issue. That is, if the Joint Petitioners make the business decision to not limit their liability in their tariffs and contracts consistent with industry standards, then they should bear the risk associated with their business decision.[17]

Finally, the Joint Petitioners repeatedly ask the Commission to merely require the Joint Petitioners' limitations of liability provisions to be "commercially reasonable."[18] As noted above, however, an interconnection agreement simply is not a commercial contract. Additionally, granting the Joint Petitioners' request would gut the protections ultimately ordered by the Commission by relieving the Joint Petitioners of any obligation to BellSouth if the Joint Petitioners can concoct an argument that it is "commercially

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15 *Petition* at 9 (emphasis added).

16 FL Tr. at 947. In the Georgia hearing, Ms. Blake simply testified that she was unaware of the specifics of BellSouth's CSAs and that such contracts may contain some deviations from BellSouth's standard tariff provisions. *See* GA Tr. at 999-1001. It is clearly unreasonable for the Joint Petitioners suggest that this unremarkable statement somehow supports their erroneous contention that "that the record in this proceeding demonstrates that both Joint Petitioners and BellSouth develop varying limitation of liability provisions." (*Petition* at 8)

17 *Order* at 10; Blake Rebuttal Testimony at 8.

18 *Petition* at 8, 9, and 10.

reasonable" for them to refuse to limit their liability to their end users within industry standards.[19]

Issue 6: BellSouth Issue Statement: How should indirect, incidental or consequential damages be defined for purposes of the Agreement? Joint Petitioners' Issue Statement: Should the Agreement expressly state that liability for claims or suits for damages incurred by CLEC's (or BellSouth's) customers/End Users resulting directly and in a reasonably foreseeable manner from BellSouth's (or CLEC's) performance of obligations set forth in the Agreement are not indirect, incidental or consequential damages? (GT&C Section 10.4.4)

The Commission found that the Joint Petitioners' proposed language "is unnecessary and defeats limitation of liability protections provided by language adopted by the Commission."[20] The Joint Petitioners' take issue with this finding, claiming that they are seeking "clearer definitions of 'indirect, incidental, and consequential' damages" because "'state law' may not wholly define such damages . . . ."[21] They then claim that their proposed language "makes clear that all parties shall remain responsible for damages that are direct and foreseeable and that such responsibility should not be avoided on grounds that there has been an agreement to eliminate 'indirect, incidental, and consequential' damages."[22] The Joint Petitioners, therefore, appear now to claim that BellSouth should be responsible to the Joint Petitioners for indirect, incidental or consequential damages to the extent such damages can be considered direct and foreseeable. That is anything but clear.

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19 While the Joint Petitioners do not like the Commission's ruling on this issue, the fact remains that Commission's ruling is appropriate and consistent with decisions rendered by at least five other state Commissions that have considered this same issue in companion arbitration dockets and of at least two state Commissions that considered this issue in a different context. *See Order* at 10.

20 *Order* at 12.

21 Petition at 11 (emphasis added).

22 *Id.*

Given that the parties have not agreed to any definitions of "indirect, incidental, and consequential" damages, the Commission appropriately decided not to define those terms in the abstract in this interconnection agreement. Instead, if a dispute as to the meaning of those terms arises, it will be addressed in the context of a concrete set of facts and in the context of the law that exists at the time. That decision is entirely appropriate, and it is consistent with the decisions of the Florida and Kentucky Commissions.[23]

Issue 9: Should a court of law be included in the venues available for initial dispute resolution for disputes relating to the interpretation or implementation of the Interconnection Agreement? (GT&C Section 13.1)

The Commission correctly found that under the language the Joint Petitioners proposed, "a dispute about an interconnection agreement this Commission arbitrates and approves could be decided by a court in a state other than South Carolina."[24] While some such disputes would fall within the Commission's jurisdiction and expertise, others might not. The *Order* recognizes this fact and does not require the Joint Petitioners to present disputes that are outside the Commission's jurisdiction and expertise to the Commission. Instead, the *Order* carefully concludes that "[d]isputes that address an interconnection agreement approved by this Commission, and that are within the jurisdiction and/or expertise of this Commission, should be presented to the Commission for resolution in

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[23] *See* FPSC Order No. PSC-05-0975-FOF-TP at 11 (Oct. 11, 2005) (". . . we shall not define indirect, incidental or consequential damages for purposes of the Agreement. The decision of whether a particular type of damage is indirect, incidental or consequential shall be made, consistent with applicable law, if and when a specific damage claim is presented to this Commission, the FCC or a court of law."); Kentucky Commission, *Order*, Case No. 2004-00044 at 5 (Sept. 26, 2005) (". . . [t]he Commission finds that the language proposed by the Joint Petitioners is not necessary and should not be placed in the interconnection agreement. Interested persons who may be affected by the differing definitions proposed by the parties appear to have redress in courts of general jurisdiction.").

[24] *Order* at 16.

the first instance."[25] For all of the reasons set forth in the Order,[26] this is an appropriate and reasonable decision.

Issue 12: Should the Agreement explicitly state that all existing state and federal law, rules, regulations, and decisions apply unless otherwise specifically agreed to by the Parties? (GT&C, Section 32.2).

The Joint Petitioners ask the Commission to either adopt their language or, "[a]t a minimum . . . strike the final sentence of its proposed language."[27] That "final sentence," which is not "proposed language" but is instead language crafted by the Commission, reads:

> Notwithstanding the foregoing, however, no Party may assert new rights or privileges not explicitly stated in this Agreement based on existing rules, regulations, rulings or other law that were not considered by the Parties at the time of the execution of this Agreement, unless consented to by the other Party to the Agreement.[28]

The reason the Joint Petitioners dislike this last sentence so much is that it prevents them from arguing that their mistaken view of Georgia law – a view which, as explained below, a federal court in Georgia has characterized as "a clear error in judgment," "unreasonable," and "contrary to law" – is somehow embodied in the interconnection agreement.

In September 2006, the United States District Court for the Northern District of Georgia entered an order[29] that addresses an EEL audit dispute between BellSouth and

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25 *Order* at 17-18.

26 *Order at 16-17.*

27 *Petition* at 18.

28 *Order* at 21.

29 *BellSouth Telecommunications, Inc. v. Nuvox Communications, Inc.*, 2006 WL 2617123 (N.D. Ga September 12, 2006) ("the Georgia Court Order"). Exhibit A to this Response is a copy of the Georgia Court Order.

NuVox.[30] The Georgia Commission had accepted the Joint Petitioners arguments under Georgia law (which are "recapped" in their *Petition*)[31] and had "concluded that Georgia law automatically incorporates into contracts all existing law, except when the contract specifies to the contrary."[32]

The federal court explained that "[w]hile the [Georgia Commission's] statement of the law is correct, its application ignores that very same law, and is both unreasonable and clearly incorrect."[33] The Court explained that

> BellSouth and NuVox exercised their right under §251(a)(1), and negotiated voluntarily their representative interconnection rights. The Agreement shows that BellSouth and NuVox were capable of incorporating discrete sections of the existing law into specific provisions of the Agreement when desired. (*See, e.g.,* Agreement at §§ 35.37, 10.2.2, 10.2.4, 10.5.2, 10.5.4.) Such limited incorporations would have been unnecessary had BellSouth and NuVox intended a blanket incorporation of §251(c).
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> * * *
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> In short, Georgia contract law cannot be applied to pile the provisions of §251(c) into the Agreement, ignoring §252(a)(1) and the voluntary contracting rights it protects. Georgia law demands that the Agreement be interpreted with regard to *all* applicable statutory provisions. Section 252(a)(1) grants parties the freedom to contract voluntarily and on their own terms, taking or leaving the provisions of §251(b) and (c) as they see fit. The GPSC's application of Georgia law ignored several critical factors relevant to its decision -- namely the rights secured to the parties by §251(a)(1) and the clear requirements of the contract law the GPSC purported to apply. The GPSC's decision constituted a clear error in judgment, and was both unreasonable and contrary to law. The GPSC's application of Georgia law thus was arbitrary and capricious.[34]

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30 The dispute addressed in the Georgia Court Order is essentially the same as the dispute before the North Carolina Commission that is described in this Commission's *Order*. *See Order* at 19-20.

31 *See Petition* at 17.

32 Georgia Court Order at *8.

33 Id. at *13.

34 *Id.* at *13-14.

The Commission's decision to reject the Joint Petitioners' proposed language and to order the inclusion of the "last sentence" is consistent with the George Court Order, and it appropriately ensures that the Joint Petitioners' mistaken view of Georgia law is not somehow incorporated into the interconnection agreement.

Issue 97: When should payment of charges for services be due? (Attachment 7, Section 1.4)

The Joint Petitioners' claim that the "record shows that BellSouth, on average, takes 7 days to post or deliver a bill."[35] This claim is wrong. While the Joint Petitioners offered testimony regarding the results of outdated and inaccurate bill "studies" that were never produced,[36] they make no attempt to address (or otherwise rebut) the record evidence that unquestionably demonstrates that the most recent, reliable, and accurate data on this issue (SQM results for billing invoice timeliness) shows that the Joint Petitioners receive their bills, on average, in about 3 or 4 days from the bill date.[37]

Additionally, the Joint Petitioners claim that the billing system modifications required to implement the Joint Petitioners' request for special billing treatment "would not be very difficult at all[.]"[38] This claim is unsubstantiated conjecture. BellSouth did not quantify the approximate cost of modifying its billing systems to accommodate the Joint Petitioners' proposal for special payment terms, and the Joint Petitioners made no request for BellSouth to estimate such costs. Further, no attempt to approximate such

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35 *Petition* at 18.

36 The NuVox bill study concluded in July 2003. (Russell FL Staff Depo. at 66); the NewSouth bill study was conducted prior to the NuVox/NewSouth merger (May 2004) and was conducted outside of the purview of the NewSouth witness in this proceeding. Russell FL Staff Depo. at 64). The Xspedius bill study commenced in December 2003 and concluded four to eight months later. (Falvey Depo. at 311-312).

37 FL Tr. at 417-423; FL BellSouth Exhibit 19; GA Tr. at 517-518; GA BellSouth Ex. 15; Blake Rebuttal Testimony at 38, Exhibit KKB-7.

38 *Petition* at 19.

costs was warranted because the Joint Petitioners repeatedly testified they are unwilling to pay for the costs associated with implementing their request for special payment terms.[39] The Joint Petitioners assert that "[a]t best, the record contains a claim that unspecified changes would need to be made [to implement their proposal]."[40] To the contrary, the record contains evidence -- unquestioned by the Joint Petitioners – that implementing the Joint Petitioners' request for special payment terms would involve significant and costly modifications to BellSouth's billing systems.[41]

Incredibly, the Joint Petitioners cite various payment due date rulings rendered in arbitration proceedings involving BellSouth and ITC^DeltaCom in support of their petition for reconsideration.[42] It bears repeating that the Joint Petitioners have rejected the payment and deposit terms contained in ITC^DeltaCom's interconnection agreement.[43] Further, BellSouth and ITC^Deltacom did not implement the various payment due date rulings issued in the BellSouth/ITC^Deltacom arbitrations. Instead, and as part of the resolution of several arbitration issues, ITC^DeltaCom agreed to payment terms that did not require any modifications to BellSouth's billing systems.[44]

In any event, the evidence of record belies any claim that the Joint Petitioners need additional time to pay their bills. Specifically, NuVox, which claims to receive over 1,110 bills per month from BellSouth,[45] has paid all of its bills in a timely manner

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39 FL Tr. at 416; GA Tr. at 518.

40 *Petition* at 19.

41 Blake Rebuttal Testimony at 37.

42 *Petition* at 19-20.

43 Blake Rebuttal Testimony at 46-47.

44 Exhibit KKB-9 to Kathy Blake's Rebuttal Testimony contains ITC^DeltaCom's payment terms.

45 Joint Petitioners' Response to FL Staff's Interrogatory No. 71.

for at least two years.[46] Consequently, the Joint Petitioners' assertions and arguments are directly refuted by the facts of record.

Issue 100: Should CLEC be required to pay past due amounts in addition to those specified in BellSouth's notice of suspension or termination for nonpayment in order to avoid suspension or termination? (Attachment 7, Section 1.7.2)

The *Petition* recycles the same speculative, unsupported, and misleading arguments that the Commission previously rejected in adopting BellSouth's position for Issue 100. Once again, the Joint Petitioners attempt to mislead the Commission by quoting out of context a federal statute (47 U.S.C. § 214(a)) that has absolutely nothing to do with suspension or termination of service for non-payment.[47] As explained in BellSouth's Post-Hearing Brief, 47 U.S.C. § 214 (a) is a *certification statute* that has nothing to do with the termination of service because of non-payment.[48] Moreover, the Joint Petitioners know that 47 U.S.C. § 214(a) is irrelevant. Specifically, one of the Joint Petitioners (Xspedius) recently filed an application pursuant to Section 214(a) requesting authority to transfer control of Xspedius to Time Warner Telecom.[49] Xspedius' Section 214 application makes no mention of suspension or termination of service for non-payment.

Moving beyond the Joint Petitioners' misapplication of this federal statute, the Joint Petitioners cite no evidence of record to support their mantra that BellSouth's proposal for Issue 100 "builds in guess work, creates unnecessary confusion and

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46 Russell Depo. at 231; FL Tr. at 264; GA Tr. at 513.

47 *Petition* at 22; *see* Joint Petitioners Post-Hearing Brief at 58 (same argument).

48 BellSouth Post-Hearing Brief at 55.

49 Exhibit B to this Response is the application filed by Xspedius and Time Warner Telecom pursuant to § 214 to transfer control of Xspedius to Time Warner Telecom Inc. *See generally* FCC WC Docket No. 06-158. The application is a publicly available document that Xspedius filed with the FCC after the submission of Post-Hearing Briefs in this docket.

threatens the businesses of Joint Petitioners and their customers."[50] Further, the Joint Petitioners' assertion that the adoption of BellSouth's language will subject South Carolina citizens "to service termination without notice or Commission oversight," is simply wrong. Specifically, the parties have already agreed that service discontinuance will be made in accordance with all applicable Commission rules.[51]

The record thoroughly debunks the Joint Petitioners' unsupported allegations regarding the timely posting of payments; recognition of billing disputes; and the accuracy of the information BellSouth provides to a CLEC that fails to pay its bills on time.[52] Indeed, BellSouth witness Kathy Blake plainly testified that a CLEC that fails to timely pay undisputed amounts is in constant communication with BellSouth's collections group and such CLEC will be provided with an aging report(s) that shows, by billing account number, current charges, past due charges, disputed charges, total past due amount owed less current charges and disputed charges, plus the ability to determine amounts that will become past due during the notice period.[53] Moreover, the Joint Petitioners offered no evidence that they have been unable to calculate any past due amounts owed to BellSouth. To the contrary, the NuVox witness admitted that there was no guesswork involved in the example of BellSouth's collections process that he reviewed on the stand in Florida.[54]

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50 *Petition* at 23.

51 Attachment 7, § 1.7.4.

52 *See Petition* at 23-24.

53 Blake Rebuttal Testimony at 44-45. *See also* BellSouth's Response to FL Staff Interrogatory No. 117, which is attached as Exhibit KKB-8 to Ms. Blake's Rebuttal Testimony. Exhibit KKB-8 includes several BellSouth aging reports and correspondence between BellSouth and a CLEC that failed to timely pay undisputed amounts owed.

54 FL Tr. at 268-269.

Further, the Joint Petitioners' claim that the Commission's decision is contrary to the majority of rulings on this issue.[55] In addition to being consistent with the Florida Commission's ruling on this issue, however, the Commission's ruling for Issue 100 is also consistent with the ruling rendered by the Mississippi Arbitration Panel and the proposed recommendation of the Louisiana Administrative Law Judge.[56]

The Joint Petitioners drone on about an aging report not being an "official" document.[57] Of course, the bill a Joint Petitioner failed to timely pay which triggered the aging report is the official document. More importantly, the "official" status of an aging report is irrelevant because BellSouth has offered to contractually commit to advise the Joint Petitioners of the additional, undisputed amounts that must be paid to avoid suspension or termination.[58] Given BellSouth's proposal, the Joint Petitioners' concerns lack merit.

Issue 102: Should the amount of the deposit BellSouth requires from CLEC be reduced by past due amounts owed by BellSouth to CLEC? (Attachment 7, Section 1.8.3.1)

The *Petition* inaccurately claims that "BellSouth has demonstrated a poor payment history and a penchant for deposits."[59] The record contains no such history. Rather, the record demonstrates that NuVox bills BellSouth $1,000 a month (with no

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55 *Petition* at 24.

56 *Florida Order* at 65-66; *Mississippi Order* at 38; Louisiana Commission Docket No. U-27798, *Proposed Recommendation of the Administrative Law Judge* (Sept. 12, 2006) ("*Louisiana Proposed Recommendation*") at 24. No Arbitration Order has been issued in Alabama.

57 *Petition* at 24.

58 Specifically, BellSouth's proposed language provides that "[u]pon request, BellSouth will provide information to [Joint Petitioner] of the Additional Amounts Owed that must be paid prior to the time periods set forth in the written notice to avoid [suspension or termination of service] as set forth in the initial written notice."). *See* Exhibit A to BellSouth's Post-Hearing Brief at 10.

59 *Petition* at 26-27.

allegations, much less, evidence, that BellSouth does not timely pay such amounts).[60] As for Xspedius, the record demonstrates that BellSouth is current in paying reciprocal compensation charges owed to Xspedius.[61] In short, the record squarely and convincingly rebuts the Joint Petitioners' suspect and unsupported claim about BellSouth's payment history. In any event, the Joint Petitioners' remedy for addressing late payment by BellSouth should be suspension/termination of service or the application of late payment charges.[62] The Joint Petitioners have not even attempted to articulate why such remedies are insufficient.

Additionally, the Joint Petitioners' mischaracterizations regarding BellSouth's alleged "penchant for deposits" is a red herring. It is undisputed that BellSouth has a contractual right to a deposit.[63] Further, it is undisputed that BellSouth will refund any deposit amount -- provided the Joint Petitioners satisfy the deposit criteria.[64]

In sum, the Joint Petitioners have simply rehashed previously rejected arguments in support of its petition for reconsideration – arguments that this Commission, and every other ruling body, have flatly rejected.[65]

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60 SC Tr. at 400.

61 Blake Rebuttal Testimony at 50 and Exhibit KKB-10. *See also* FL Tr. at 625-626; FL BellSouth Exhibit 21.

62 Blake Rebuttal Testimony at 52.

63 Attachment 7, § 1.8.

64 Attachment 7, § 1.8.10.

65 *Florida Order* at 70 ("We find that reducing the deposit BellSouth requires from the Joint Petitioners by past due amounts owed by BellSouth is not appropriate."); *North Carolina Order* at 88 ("Commission concludes that CLPs should not be allowed to offset security deposits by amounts owed to them by another carrier."); *North Carolina Recon Order* at 72 (upholding initial decision); *Kentucky Order* at 19 ("Commission finds that the issue of the amount owed by a CLEC to BellSouth and the amount owed to a CLEC by BellSouth are distinct issues and declines to accept the Joint Petitioners' position."); *Kentucky Recon Order* at 23-24 (upholding initial decision); *Mississippi Order* at 43 ("The amount of the deposit BellSouth requires from CLEC should not be reduced by past due amounts owed by BellSouth to CLEC."); *Georgia Order* at 35 (adopting Staff's

Issue 103: Should BellSouth be entitled to terminate service to CLEC pursuant to the process for termination due to non-payment if CLEC refuses to remit any deposit required by BellSouth within 30 calendar days? (Attachment 7, Section 1.8.6)

The *Petition* claims that "legitimate disputes" can arise over deposit demands and that "[s]uspension or termination is too grave a remedy" when there are such disputes.[66] Joint Petitioners' concerns about deposit-related disputes are irrelevant. Issue 103 has nothing to do with deposit-related disputes. Indeed, the Parties have an agreed upon deposit dispute provision.[67] In petition for reconsideration, the Joint Petitioners curiously fail to mention this fact.

Additionally, the Joint Petitioners claim that adoption of their position "is the only way for the Commission to ensure that service provided to Joint Petitioners' South Carolina customers is not improperly and unlawfully suspended or terminated, possibly without notice."[68] This assertion is simply wrong. Again, the parties have already agreed that service discontinuance will be made in accordance with all applicable Commission rules.[69]

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recommendation to adopt BellSouth's position); *Louisiana Proposed Recommendation* at 26 (adopting BellSouth's proposed language); Tennessee Regulatory Authority, April 17, 2005 Agenda Conference (transcript at 36-37)(adopting BellSouth's proposal).

66 *Petition* at 27.

67 Attachment 7, § 1.8.7

68 *Petition* at 28.

69 Attachment. 7, § 1.7.4.

CONCLUSION

For the reasons set forth herein, the Commission should deny the Joint Petitioners' Petitioner for Reconsideration.

Respectfully submitted this 2nd day of November 2006.

PATRICK W. TURNER
General Counsel-South Carolina
1600 Williams Street
Columbia, South Carolina 29201
(803) 401-2900

ROBERT A. CULPEPPER
BellSouth Center - Suite 4300
675 West Peachtree Street, N.E.
Atlanta, GA 30375
(404) 335-0841

ATTORNEYS FOR
BELLSOUTH TELECOMMUNICATIONS, INC.

655967

EXHIBIT A

Briefs and Other Related Documents
Bellsouth Telecommunications, Inc. v. Nuvox Communications, Inc.N.D.Ga.,2006.Only the Westlaw citation is currently available.

United States District Court,N.D. Georgia,Atlanta Division.

BELLSOUTH TELECOMMUNICATIONS, INC., Petitioner,
v.
NUVOX COMMUNICATIONS, INC.; The Georgia Public Service Commission; Robert B. Baker, in his official capacity as Commissioner of the Georgia Public Service Commission; H. Doug Everett, in his official capacity as Commissioner of the Georgia Public Service Commission; Angela E. Speir, in her official capacity as Commissioner of the Georgia Public Service Commission; Stan Wise, in his official capacity as Commissioner of the Georgia Public Service Commission, Respondents.

No. 1:04-CV-2790-WSD.

Sept. 12, 2006.

Gregory B. Mauldin, Teresa Thebaut Bonder, Alston & Bird, LLP-GA, Lisa Spooner Foshee, Bellsouth Corporation, Atlanta, GA, for Plaintiff.
Anne Ware Lewis, Frank B. Strickland, Strickland Brockington Lewis, Daniel S. Walsh, Isaac Byrd, Sidney R. Barrett, Jr., Office of State Attorney General, Atlanta, GA, for Defendant.

OPINION AND ORDER

WILLIAM S. DUFFEY, JR., District Judge.

***1** This matter is before the Court on Petitioner's BellSouth Telecommunications, Inc.'s ("BellSouth") First Amended Petition for Judicial Review and Complaint for Declaratory and Injunctive Relief [3] challenging an Order of the Georgia Public Service Commission (the "GPSC") interpreting an interconnection agreement (the "Agreement") between BellSouth and NuVox Communications, Inc. ("NuVox").

I. FACTUAL BACKGROUND

On September 23, 2004, BellSouth filed a petition for judicial review and complaint for declaratory judgment against the GPSC, its Commissioners, and NuVox. BellSouth complains that the GPSC improperly interpreted a telecommunications interconnection agreement between BellSouth and NuVox [FN1] and imposed unwarranted restrictions on BellSouth's right to audit NuVox's local exchange traffic, beyond those in its agreement with NuVox.

FN1. The Agreement itself lists as parties BellSouth and TriVergent Communications, Inc. The parties do not explain how NuVox became a party-ininterest to the Agreement. NuVox does not dispute that it is a party to the Agreement, and the Court will accept that it is.

A. *The Legal and Technological Framework*

This dispute arises in the context of the federal government's facilitation of increased competition in the telecommunications industry. Traditionally, and as recently as the last decade, the telecommunications industry operated as a natural monopoly. Congress implemented the Telecommunications Act of 1996 (the "1996 Act") to foster an environment to promote competition among telecommunications providers. *See* Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56 (1996) (codified in scattered sections of title 47 of the United States Code).

Access to infrastructure is one of the primary barriers to competition in the telecommunications industry. *See, e.g., MCI Worldcom Comm., Inc. v. BellSouth Telecomm., Inc.* 446 F.3d 1164, 1166-67 (11th Cir.2006). Incumbent local exchange carriers ("ILECs") such as BellSouth own much of the infrastructure necessary to provide telecommunications service to consumers. *Id.* This infrastructure consists of circuits, wires, switches, and other hardware necessary to route and carry electronic signals from one communications device to another. Of particular interest for the present dispute is the Enhanced Extended Loop ("EEL"), a type of telephone circuit that connects individual customers to an exchange carrier. (Principal Brief on the Merits of Petitioner BellSouth Telecommunications, Inc. at 9-10) ("BellSouth Brief"). *See also Competitive Telecomms. Ass'n v. FCC*, 309 F.3d 8, 10-11 (D.C.Cir.2002). EELs can be used to carry local exchange service or to carry more profitable special access services, such as long-

distance toll calling.

In the past, ILECs operating as monopolies had the opportunity both to absorb the tremendous cost of building infrastructure over a span of decades and to recover that cost without the impediment of rate competition. *MCI Worldcom*, 446 F.3d at 1168. The cost of developing infrastructure comprises a commercially forbidding barrier to entry into the field. *Id.*

Accordingly, the 1996 Act mandates that ILECs share infrastructure with competitive local exchange carriers ("CLECs"). This sharing is accomplished through the process known as "unbundling." Unbundling requires ILECs to "make elements of their networks [such as EELs] available on an unbundled basis to new entrants at cost-based rates." In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 18 F.C.C.R. 16978, 16984 (2003). *See also* 47 U.S.C. § § 251-252 (2000). ILECs must make unbundled network elements such as EELs available to CLECs on reasonable terms, thus removing a forbidding barrier and facilitating the entry of competition into the field. *Id.* § 251(b), (c).

***2** The 1996 Act offers ILECs and CLECs a choice regarding the terms of interconnection. The preferred option is for the parties to negotiate an interconnection agreement, voluntarily and without regard to the comprehensive guidelines embodied in 47 U.S.C. § § 251(b) and (c) and its attendant rules, orders, and regulations. 47 U.S.C. § 252(a)(1) (2000). If the parties opt not to negotiate or if negotiation fails, state public service commissions ("PSCs") are obligated to arbitrate an interconnection agreement. *Id.* § 251(b)(1). When the provisions of an interconnection agreement are arbitrated, PSC's must determine the provisions in accordance with § § 251(b) and (c). *Id.* § 252(c)(1).

Although the 1996 Act requires parties to reach an interconnection agreement, ILECs are not required to surrender access to their infrastructure unconditionally or without compensation. The 1996 Act allows ILECs to charge for access, and permits ILECs to impose reasonable conditions on interconnection. *Id.* § § 251(c)(2)(D), 252(b)(2)(B). One typical restriction relevant to the present dispute is for the CLEC to certify that it will provide "a significant amount" of local exchange carrier service on each EEL, as opposed to more lucrative special rate services like long-distance toll calls. Whether the CLEC is using the EEL as allowed may be verified by audit.

The Federal Communications Commission ("FCC") is authorized to promulgate regulations to implement the 1996 Act. *Id.* § 251(d). The Act and its implementing regulations guide and govern the state commissions in their task of arbitrating, approving, interpreting, and enforcing interconnection agreements. One Court has noted the uniqueness of this situation, describing state agencies as deputies which regulate on behalf of the FCC. *MCI Telecomm. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 344 (7th Cir.2000) ("Congress has offered the states ... a role as what the carriers have called a 'deputized' federal regulator.").

The FCC has issued voluminous regulations, orders, and clarifying statements concerning the 1996 Act. Among these is the Supplemental Order Clarification In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 15 F.C .C.R. 9587 (2000) (the "June 2, 2000 Order").[FN2]

> FN2. The June 2, 2000 Order covers a wide range of topics and implements several sections of title 47. For the purposes of the present motion, however, the relevant portions of the June 2, 2000 Order implement 47 U.S.C. § 251(c), addressing the terms of interconnection agreements. The purpose of the relevant portions of the June 2, 2000 Order therefore is to assist PSCs in arbitrating terms. Section 252(a) dictates that parties can negotiate the provisions of an interconnection agreement without regard to § § 251(b) and (c), which would include the implementing portions of the June 2, 2000 Order.

B. *The Agreement Underlying the Present Dispute*

ILEC BellSouth and CLEC NuVox executed a voluntary interconnection agreement on June 30, 2000. The Agreement was approved by the GPSC. Section 10.5.4 of the Agreement, which lies at the heart of the present dispute, reads:

BellSouth may, at its sole expense, and upon thirty (30) days notice to [Nuvox], audit [Nuvox's] records not more than one [sic] [FN3] in any twelvemonth period, unless an audit finds non-compliance with the local usage options referenced in the June 2, 2000 Order, in order to verify the type of traffic being transmitted ...

FN3. The court interprets this as either "one time" or "once."

BellSouth contends that this provision on its face defines the parties' auditing rights and restrictions. NuVox and the GPSC disagree, arguing that the Agreement incorporates the June 2, 2000 Order in whole and imposes the additional requirements that BellSouth: (1) demonstrate a concern before it is allowed to conduct an audit; and (ii) use an independent auditor in performing the audit.

***3** While BellSouth and NuVox were negotiating the terms of the Agreement, the FCC issued the June 2, 2000 Order. The parties do not dispute that they were aware of the June 2, 2000 Order at the time the Agreement was executed, nor do they dispute that the June 2, 2000 Order constituted federal law when the Agreement was executed.

The June 2, 2000 Order implements the 1996 Act. June 2, 2000 Order at 9587. In its introduction, the June 2, 2000 Order identifies three purposes that the FCC intended to accomplish by issuing the June 2, 2000 Order. The third purpose is relevant to the present dispute:

Third, we clarify that incumbent local exchange carriers (LECs) must allow requesting carriers to self-certify that they are providing a significant amount of local exchange service over combinations of unbundled network elements, and we allow incumbent LECs to subsequently [sic] conduct limited audits by an independent third party to verify the carrier's compliance with the significant local usage requirements.

Id. at 9587-88.

ILEC's are allowed to verify whether a CLEC is using an EEL for a significant amount of local exchange service by conducting an audit of the CLEC's records. Paragraph 31 of the June 2, 2000 Order guides PSCs concerning what audit rights should be arbitrated in the event that parties fail to arrive at a voluntary agreement. Paragraph 31 states: "[I]ncumbent LECs may not require a requesting carrier to submit to an audit prior to provisioning combinations of unbundled loop and transport network elements." *Id.* at 9603. This statement is clarified by footnote 86, which reads:

The incumbent LEC and competitive LEC signatories ... state that audits will not be routine practice, but will only be undertaken when the incumbent LEC has a concern that the requesting carrier has not met the criteria for providing a significant amount of local exchange service. We agree that this should be the only time that an incumbent LEC should request an audit.

Id. at 9603 n.86 (citations omitted). The proper interpretation of these provisions and their application to the Agreement lies at the heart of the present dispute.

C. *The Present Dispute*

The parties substantially agree on the facts underlying the present dispute. On July 30, 2000, BellSouth and NuVox entered into a voluntary interconnection Agreement that granted NuVox access to a number of BellSouth EELs on the condition that NuVox certify that it would provide a significant amount of local exchange service over those EELs. The Agreement included an audit provision, § 10.5.4, which allows BellSouth to conduct an audit of NuVox at its own expense upon providing thirty days notice.

On March 15, 2002, BellSouth provided written notice to NuVox of its intent to audit NuVox's records pursuant to § 10.5.4 of the Agreement. NuVox refused to allow the audit on the grounds that, under the June 2, 2000 Order, BellSouth could not conduct an audit unless it first demonstrated a "concern" that NuVox was violating its certification and unless it used an "independent" third-party auditor. BellSouth replied that the plain language of the Agreement entitled BellSouth to audit NuVox upon thirty days notice and that there were no further restrictions or conditions. NuVox again refused to comply, relying on its previous objections.

***4** On May 13, 2002, BellSouth filed a complaint with the GPSC to enforce § 10.5.4 of the Agreement. On June 29, 2004, the GPSC issued an Order that held, in relevant part: (1) that the Agreement required, as a condition to conducting an audit, that BellSouth "demonstrate a concern" NuVox was violating its certification that it was providing a significant amount of local exchange traffic over BellSouth's EELs; (2) that BellSouth had demonstrated a concern with respect to 44 of the EELs leased to NuVox and could only conduct an audit of those circuits, but that the audit would be expanded if the audit of the 44 EELs indicated other problems. If so, BellSouth could reapply to the GPSC

for an audit of other circuits; and (3) that the Agreement requires BellSouth to use an independent auditor that complies with standards set by the American Institute of Certified Public Accountants ("AICPA"). (June 29, 2000 Order Adopting In Part and Modifying In Part the Hearing Officer's Recommended Order at 15-16) (the "GPSC Order").

BellSouth petitioned the GPSC to reconsider its Order. On August 24, 2004, the GPSC affirmed its original decision. On September 23, 2004, BellSouth filed the present petition for review and declaratory judgment.

BellSouth seeks review of the following issues: (1) Whether the GPSC violated the 1996 Act by incorporating the June 2, 2000 Order into the Agreement; (2) Whether the GPSC erred in interpreting the June 2, 2000 Order to require ILECs to "demonstrate a concern" as a condition prior to conducting an audit; and Whether the GPSC erred by interpreting the Agreement to require BellSouth to "demonstrate a concern" prior to conducting an audit, and to require BellSouth to use an independent third-party auditor. (Petitioner's First Amended Petition for Judicial Review and Complaint for Declaratory and Injunctive Relief at 12-15.)

II. DISCUSSION

A. *Jurisdictional Issues*

The GPSC raises several jurisdictional issues, including allegations of mootness and unripeness. Specifically, GPSC argues this Court lacks jurisdiction because BellSouth's claims concerning whether the Agreement requires it to "have a concern" prior to audit are not ripe, and that BellSouth's claims concerning whether the Agreement requires it to hire an independent auditor are moot. (Brief on the Merits of Defendants [Respondents] Georgia Public Service Commission and Robert B. Baker et. al. at 11-13) ("GPSC Brief"). The Court disagrees. The Court has jurisdiction to review the GPSC's Order, and each issue represented by BellSouth is justiciable.

1. *Jurisdiction*

As a general matter, this Court exercises jurisdiction to review the GPSC's order for compliance with federal law under 28 U.S.C. § 1331. A district court's jurisdiction to review determinations of a PSC interpreting or enforcing interconnection agreement under the 1996 Act is beyond question. *Verizon Maryland, Inc. v. Public Service Com'n of Maryland*, 535 U.S. 635, 643-44 (2002), ("nothing in the Act displays any intent to withdraw federal jurisdiction under § 1331; we will not presume that the statute means what it neither says nor fairly implies.") *Id.* at 644. The Eleventh Circuit specifically has held that district courts are granted jurisdiction over PSC orders interpreting interconnection agreements by 47 U.S.C. § 252(e)(6), which permits federal courts review "determinations" made by state commissions under the Act. *BellSouth Telecomm., Inc. v. MCImetro Access Transmission Services, Inc.*, 317 F.3d 1270, 1277-78 (11th Cir.2003) ("it is consistent with the [1996 Act] to have state commissions interpret contracts and subject their interpretations to federal review in the district courts.").

***5** This Court has jurisdiction to consider the GPSC's interpretation of Georgia law and of the Agreement under that law. *Id.* at 1278-79.

2. *Ripeness*

The GPSC claims that whether BellSouth must "demonstrate a concern" as a condition to conducting an audit is not ripe because "BellSouth has yet to be harmed, and may never be harmed by the GPSC's decision...." (GPSC Brief at 11.) The GPSC asserts this conclusion on the fact that its Order did not foreclose all possibility of BellSouth conducting an audit of all the EELs. It argues the Order allows BellSouth to audit 44 of the circuits. (GPSC Order at 16.) It contends further that if BellSouth is able to show some evidence justifying a concern over the integrity of NuVox's use certification of other circuits, the GPSC may allow a broader audit. (*Id.*) The GPSC concludes that whatever harm BellSouth may suffer is still speculative, and thus its claims are not ripe. (GPSC Brief at 12.)

The "ripeness" requirement safeguards the Article III "case or controversy" requirement and accounts for "prudential considerations arising from problems of prematurity and abstractness that may present insurmountable obstacles to the exercise of the court's jurisdiction...." *Johnson v. Sikes*, 730 F.2d 644, 648 (11th Cir.1984). The "basic rationale is to prevent the courts, through the avoidance of premature adjudication, from entangling themselves in abstract disagreements...." *Id.* (citations omitted). The Eleventh Circuit ripeness evaluation has a "twofold

aspect" in which it considers "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id. See also Cheffer v. Reno*, 55 F.3d 1517, 1524 (11th Cir.1995); *Ouachita Watch League v. Jacobs*,-F .3d-, 2006 WL 25284888 (11th Cir., Sept. 5, 2006). Pure issues of law are considered fit for judicial decision. *See, Cheffer*, 55 F.3d at 1524.

Three further factors must be considered under the fitness/hardship test:
In applying the fitness and hardship prongs, we must consider the following factors: (1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented.

Beaulieu v. City of Alabaster, 454 F.3d 1219, 1227 (11th Cir.2006) (citations omitted).

BellSouth's claim that the Agreement does not impose a requirement that BellSouth "demonstrate a concern" prior to conducting an audit is ripe. First, the claim is fit for judicial decision. The Court is required only to consider issues of law, particularly the interpretation of federal law, state law, and contract to reach a decision. No further factual development is necessary.

The Court's consideration of this issue also does not interfere inappropriately with GPSC action. The GPSC has ordered BellSouth to engage in a progressive auditing process that likely will require further administrative action by the GPSC, at the very least when the GPSC is required to determine whether BellSouth has made a showing sufficient to justify an audit of the EELs after the initial 44 are audited. Action by this Court would interfere with the stepped system imposed by the GPSC, possibly by abolishing it altogether. If action by this Court interfered with the GPSC's system, however, it would do so appropriately. That is, while the GPSC has authority under § 252(e) to interpret and enforce the Agreement, *BellSouth Telecomm., Inc. v. MCImetro Access Transmission*, 317 F.3d 1270, 1277-78 (11th Cir.2003), this authority is subject to review by a district court. *Id.; see also* 47 U.S.C. § 252(e)(6). The GPSC is not entitled to operate without oversight. If a party claims to be aggrieved, § 252(e)(6) entitles this Court to review the GPSC's orders, and, if warranted, to take corrective action. In this case, the GPSC issued an order under which BellSouth claims to be aggrieved. If the Court finds that the GPSC's determinations were in error and takes corrective action that interferes with the GPSC's proposed actions, such interference cannot be said to be inappropriate.

***6** Second, BellSouth will suffer hardship if the Court refuses to hear this issue. BellSouth claims it is entitled under the Agreement to audit all of its EELs on thirty days notice. The GPSC is restricting the scope of the rights to which BellSouth claims it is entitled. This constitutes a hardship.

Furthermore, the conditions under which BellSouth is permitted to audit NuVox affects the commercial relationship between the parties. Restrictions beyond the scope of the Agreement (as claimed by BellSouth), or even uncertainty regarding the scope of BellSouth's audit rights, imposes upon BellSouth a relative competitive disadvantage. The more restrictions in place on BellSouth's audit rights, the easier for NuVox to violate the terms of the Agreement, including by providing more lucrative non-local exchange services. The 1996 Act forces direct competitors like BellSouth and NuVox to deal. BellSouth cannot simply walk away from the interconnection agreement. If, as BellSouth claims, the GPSC Order imposes undue restrictions on BellSouth's ability to verify its competitor's good faith in this forced relationship, its commercial interests are already affected. In short, BellSouth claims that the GPSC Order puts it in the difficult position of being obligated to deal with a direct competitor while at the same time restricting its ability to monitor that deal. This issue is ripe to be addressed.

The GPSC also argues that the "demonstrate a concern" issue is not ripe, because the GPSC has not yet issued a "final" decision on the matter.[FN4] (GPSC Brief at 12.) This contention is without merit. Nothing in the 1996 Act restricts judicial review to "final" administrative decisions.

> FN4. The GPSC apparently still has not issued a "final" decision. The practical effect of this is that the GPSC Order has indefinite application, and this is final as a practical matter.

47 U.S.C. § 252(e)(6) constitutes an independent basis of jurisdiction under which this Court is entitled to review state PSC determinations regarding interconnection agreements. *BellSouth Telecomm., Inc.*, 317 F.3d at 1277 ("Section 252(e)(6) gives

federal courts jurisdiction to review 'determinations' made by state commissions."). Section 252(e)(6) states: "In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court...." The statute does not contain a "finality" requirement as a condition of this Court's review. The GPSC has made a determination, NuVox is relying on it by refusing audits and BellSouth claims to be aggrieved by it. That is all Section 256(e)(6) requires. The fact that the GPSC anticipates further involvement does not affect the ripeness of BellSouth's petition to this Court.

3. *Mootness*

The GPSC claims that the issue of whether BellSouth is required to hire an independent auditor is moot. The GPSC argues that because BellSouth is already conducting an audit by an independent auditor, there is no current controversy over whether an independent auditor is required. (GPSC Brief at 13-14.) The GPSC further claims that, because it has stated that it will accord no weight in its role as fact-finder to a non-independent audit, a BellSouth victory on this issue would be "fruitless" because the GPSC would not respect a complaint based on such an audit *Id.* at 14-15. The Court disagrees with the GPSC's conclusions.

***7** The doctrine of mootness exists to ensure, consistent with Article III of the Constitution, that federal courts avoid issuing advisory opinions by only deciding active cases or controversies. *See Adler v. Duval County School Bd.*, 112 F.3d 1475, 1477 (11th Cir.1997). Article III requires that "a plaintiff must have suffered some actual injury that can be remedied or redressed by a favorable judicial decision." *Nat'l Advert. Co. v. City of Ft. Lauderdale*, 934 F.2d 283, 286 (11th Cir.1991).

The Eleventh Circuit addressed a mootness issue similar to the one here in *MCI Telecomm. Corp. v. BellSouth Telecomm., Inc.*, 298 F.3d 1269 (11th Cir.2002). In *MCI Telecomm.*, CLEC MCI challenged the Florida PSC ("FPSC") resolution of a dispute over the terms of an interconnection agreement with ILEC BellSouth. *Id .* at 1271. The parties were not able to negotiate voluntarily all of the terms of an interconnection agreement, and at least some of the terms were required to be arbitrated by the FPSC. *Id.* During the arbitration, the FPSC refused MCI's request to include enforcement and compensation provisions in the agreement on the grounds that it lacked authority to do so. *Id.* MCI appealed to the district court for the Northern District of Florida, which reversed the FPSC determination, holding that the FPSC was required to arbitrate any issue presented in an arbitration petition under the 1996 Act. *Id.* at 1273. The FPSC held arbitration hearings to consider the requested provisions, as required by the district court. *Id.*

On BellSouth's appeal to the Eleventh Circuit, MCI argued that the issue of the FPSC's authority to consider the enforcement provision was moot because "[h]aving [followed the district court's order], there was nothing more for the FPSC to do ..." *Id.* In other words, because the FPSC had already considered the provision, MCI argued that any decision on whether the FPSC should have done so would be purely academic. *Id.* The Eleventh Circuit disagreed, and found BellSouth presented a justiciable issue. *Id.* at 1274.

The Eleventh Circuit court noted that a reversal of the District Court which negated the outcome of the court-mandated arbitration proceedings would, in effect, "grant[ ] meaningful relief to BellSouth, not merely offer[ ] an advisory opinion on a hypothetical question concerning the FPSC's power under the Act. The possibility of that outcome is sufficient for a finding that the question is not moot ..." *Id.* at 1273-74. The Eleventh Circuit further noted: "Temporary compliance with a decree pending appeal ... clearly should not moot a case.' " *Id.* at 1274 n.6, *quoting* Charles A. Wright et. al., *Federal Practice and Procedure* § 3533 .7, at 355 (2d. ed.1984). *See also Nat'l Advert. Co. v. City of Ft. Lauderdale*, 934 F.2d 283, 286 (11th Cir.1991). ("voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.")

***8** The "independent auditor" issue also is not moot. BellSouth contends that the Agreement grants to it the right to conduct audits with an auditor of its choosing, and does not restrict it to AICPA-certified auditors. The GPSC Order prevents BellSouth from exercising what BellSouth argues are the full scope of its rights under the Agreement, both for the present and any future audits. If the Court overturns the GPSC Order, BellSouth argues it would be granted meaningful relief, and not merely issue an advisory opinion. Whether BellSouth is required to use an independent auditor is a live controversy that is not mooted by its temporary compliance with the GPSC Order pending the present review.[EN5]

FN5. The GPSC's declaration that it will not accord any weight to an audit conducted by a non-independent auditor does not alter the mootness analysis. The controversy here is not over the weight that the GPSC can or must give to the outcome of a BellSouth audit, but rather over the scope of the audit rights granted to BellSouth under the Agreement. BellSouth contends that it contracted for the right to conduct audits as it determines is appropriate. No matter how unpersuasive the GPSC might find a "non-independent" audit, there exists a live controversy over BellSouth's alleged contractual right to conduct one.

B. *Standard of Review of GPSC Decisions*

This is a review of an administrative decision by the GPSC regarding the interpretation and enforcement of the interconnection Agreement between BellSouth and NuVox. The Eleventh Circuit has set out a two-tiered standard to govern such determinations. The Court accords no deference to GPSC interpretations of federal law, and these issues are reviewed *de novo*. *MCI Worldcom Comm., Inc. v. BellSouth Telecomm., Inc.*, 446 F.3d 1164, 1170 (11th Cir.2006). The GPSC's factual findings are reviewed under an "arbitrary and capricious" standard. *Id.*

The parties disagree on what standard of review applies to the GPSC's interpretation of the interconnection agreement under Georgia law. BellSouth, relying on the general principle that contract interpretation is a matter of law, argues that the GPSC is not particularly well-suited to address issues of Georgia state law. BellSouth thus contends the Court should exercise *de novo* review of the GPSC's state law interpretation to the Agreement. (BellSouth Brief. at 5-7.). NuVox and the GPSC disagree. They maintain that the Court should accord the GPSC deference in all findings except interpretations of federal law. (GPSC Brief at 9); (Response Brief on the Merits of Respondent NuVox Communications, Inc. at 9-11) ("NuVox Brief"). The Eleventh Circuit has not addressed this particular standard of review issue and this Court considers it as one of first impression in this circuit.

In *BellSouth Telecomm. v. MCIMetro Access Services, Inc.*, the Eleventh Circuit held that the statutory duty of state PSCs to approve or reject voluntary interconnection agreements includes the power to interpret the agreements. 317 F.3d 1270, 1276-77 (11th Cir .2003) (en banc). In doing so, the Eleventh Circuit approved the FCC observation that state commissions were "well-suited to address disputes arising from interconnection agreements." *Id.* at 1277 (citations omitted). The Eleventh Circuit further noted that "in granting to the public service commissions the power to approve or reject interconnection agreements, Congress intended to include the power to interpret and enforce *in the first instance....* " *Id.* (emphasis added). The court reasoned:

***9** A state commission's authority to approve or reject an interconnection agreement would itself be undermined if it lacked authority to determine in the first instance the meaning of the agreement it has approved. A court might ascribe to the agreement a meaning that differs from what the state commission believed it was approving-indeed, the agreement as interpreted by the court may be one the state commission would never have approved in the first place.

Id. at n.9. This commentary by the Eleventh Circuit on the fitness of state public service commissions to interpret interconnection agreements under state law is persuasive, and the Court finds that deference to the state-law findings of the GPSC is appropriate.

This interpretation is consistent with a number of other circuits which have addressed this issue. They have accorded deference to PSCs, and have reviewed issues other than the interpretation of federal law under an "arbitrary and capricious" standard. *See., e.g., GTE South, Inc. v. Morrison*, 199 F.3d 733 (4th Cir.1999); *U.S. West Comm. v. MFS Intelnet, Inc.*, 193 F.3d 1112 (9th Cir1999); *Southwestern Bell Tel. Co. v. Waller Creek Comm., Inc.*, 221 F.3d 812 (5th Cir.2000); *Southwestern Bell Tel. Co. v. Apple*, 309 F.3d 713, 717 (10th Cir.2002); *Michigan Bell Telephone Co. v. MFS Intelnet of Michigan, Inc.*, 339 F.3d 428, 433 (6th Cir.2003).

This Court will review the GPSC's interpretation of the Agreement under the "arbitrary and capricious" standard. The arbitrary and capricious standard requires this court to "determine whether there was a reasonable basis for the ... decision." *Hunt v. Hawthorne Assocs., Inc.*, 119 F.3d 888, 911 (11th Cir.1997) *quoting Jett v. Blue Cross & Blue Shield of Ala.*, 890 F.2d 1137, 1139 (11th Cir.1989). The Court must overturn the decision of the GPSC if it finds a "clear error of judgment" or if it finds that the GPSC failed to consider "the relevant factors." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402,

416 (1971) *overruled on other grounds at Califano v. Sanders*, 430 U.S. 99 (1977).

C. *The GPSC'S Interpretation of Federal Law*

1. *The GPSC's Incorporation of the June 2, 2000 Order*

BellSouth contends that the GPSC erred as a matter of federal law by incorporating into the Agreement all of the provisions of the June 2, 2000 Order absent any clear expression by the parties that they opted out of one or more of the provisions. The Court ultimately agrees with BellSouth that the GPSC erred, but does so because the GPSC misapplied *state,* not federal, law.

PSCs are required by 47 U.S.C. § 252(e)(1) to approve or reject voluntary interconnection agreements. Subsumed in this obligation is the PSC's duty to interpret and enforce such agreements. *BellSouth Telecomm., Inc. v. MCImetro Access Transmission Services, Inc.*, 317 F.3d 1270, 1275-77 (11th Cir.2003). PSCs are authorized to interpret interconnection agreements under state law. 47 U.S.C. § 252(e)(3) ("nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement ..."). Accordingly, the GPSC was permitted to interpret the Agreement under Georgia law.

***10** In doing so, the GPSC held that the June 2, 2000 Order was incorporated into the Agreement as a matter of Georgia law, including the rules of contract interpretation. The GPSC cited two reasons for determining that the Agreement incorporated the June 2, 2000 Order: First, the GPSC ruled that under Georgia law, "parties are presumed to enter into agreements with regard to existing law." (GPSC Order at 6.) This "existing law" included the June 2, 2000 Order (which, according to the GPSC, required BellSouth both to "demonstrate a concern" as a condition to conducting an audit and to use only an AICPA certified auditor). The GPSC further reasoned, "Without language evidencing intent to vary from [the law], it is unreasonable to conclude that NuVox intended to waive its protection ." (*Id.* at 7.) In other words, the GPSC concluded that Georgia law automatically incorporates into contracts all existing law, except when the contract specifies to the contrary. (*See, e.g.,* GPSC Brief at 17) ("If parties intend to stipulate that their contract not be governed by existing law, then other governing principles must be 'expressly stated in the contract.' ") (citations omitted). Second, the GPSC contended that § 35.1 of the Agreement served expressly to incorporate all relevant laws, including the SOC, into the Agreement. (*Id.* at 16-17); (GPSC Order at 6.)

The GPSC Order does not interpret or rely on federal law to reach its conclusion that the Agreement incorporates the June 2, 2000 Order except when otherwise specified. The GPSC Order reaches this conclusion based solely to its interpretation of Georgia state law and the Agreement itself.

BellSouth contends that 47 U.S.C. § 252(a)(1) entitles parties to negotiate "without regard to" § § 251(b) and (c). BellSouth argues that the GPSC's decision to incorporate § 251(b) and (c) into the Agreement issues § 252(a)(1) and constitutes a violation of the purpose of the 1996 Act. (BellSouth Brief at 29-31.)

BellSouth's position on this issue overlooks that the GPSC also has federal statutory rights in its "deputy" capacity-namely to approve or reject interconnection agreements, including the right to interpret and enforce them under state law. 47 U.S.C. § 252(e). The GPSC's authority to reject voluntary agreements expressly includes the authority to reject agreements "not consistent with the public interest, convenience, and necessity ..." 47 U.S.C. § 252(e)(2)(A)(ii).

In the present case, the GPSC interpreted the laws of Georgia to incorporate the June 2, 2000 Order into the Agreement unless the parties provided specifically to the contrary. Leaving aside momentarily any error in the GPSC's application of Georgia law, the GPSC was entitled by statute to interpret the Agreement under Georgia law, and did not contravene the 1996 Act by so doing.

BellSouth does not argue that the GPSC is not entitled generally to interpret the Agreement under Georgia law. Although unclear, BellSouth appears to argue that § 252(a)(1) preempts the "presumption of incorporation" principle of Georgia law upon which the GPSC relied in its interpretation of the Agreement. (BellSouth Brief at 29-31.) This Court finds that the 1996 Act does not preempt the Georgia law presumption of incorporation.

***11** Courts classify preemption into three categories: express, complete (or field), and conflict:
The Supreme Court has recognized three types of preemption: (1) express preemption, where a federal

statute contains "explicit preemptive language"; (2) [complete] preemption, where the federal regulatory scheme is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," and (3) conflict preemption, where "compliance with both federal and state regulations is a physical impossibility" or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

This That and the Other Gift and Tobacco v. Cobb County, Ga., 285 F.3d 1319, 1322 (11th Cir.2002), *quoting Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 604-05 (1991). To determine preemption, Courts "look to the intent of Congress in passing the federal law." *Foley v. Luster*, 249 F.3d 1281, 1286 (11th Cir.2001). The intent of Congress "may be explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Id.*

The Congressional intentions embodied by the 1996 Act are clear from the Act's preamble and from its structure and purpose. The preamble of the 1996 Act declares it to be:
An Act to promote competition and reduce regulation in order to secure lower prices and higher quality service for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.

Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56 (1996) (codified in scattered sections of Title 47 of the United States Code).

The structure of the 1996 Act bears out the stated goals of the preamble. Section 251 of Title 47 sets out resale, connectivity, infrastructure sharing, and good-faith dealing obligations for all carriers (including extra obligations for incumbent carriers) designed to create an environment in which competition against the entrenched incumbents is possible. Section 252 dictates that ILECs and CLECs must negotiate interconnection agreements, offers the incentive of controlling the provisions of the contract to parties that reach voluntarily agreement, and deputizes state PSCs as the primary regulators in the field.

A common sense reading of the preamble and sections of the 1996 Act demonstrates that the Act's purpose is not to apply the myriad implementing regulations of § 251(b) and (c) to all interconnection agreements. That cannot be the purpose, because § 252(a)(1) allows parties to contract around those provisions. On the other hand, the 1996 Act also does not allow parties to negotiate contract provisions according to their own unbounded preferences. Section 252(e)(1) requires that even voluntarily reached agreements are subject to approval by the state PSCs. Against the backdrop of what Congress intended (and did not intend) in the 1996 Act, the Court evaluates what may be preempted here.

***12** Express preemption requires a federal statute that on its face deprives the state of authority to regulate. *Wisconsin Public Intervenor*, 501 U.S. at 604-05. ("Congress's intent to supplant state authority in a particular field may be expressed *in the terms of the statute.*") (emphasis added). The 1996 Act does not supplant state authority. To the contrary, § 252(e) expressly grants to state public service commissions both the right to regulate parties under the Act and the right to enforce state policy and law in the course of that regulation. 47 U.S.C. § 252(e)(3) ("nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement ..."). A federal statute that expressly *grants* regulatory power to states cannot be said to intend to "supplant state authority ... expressed in the terms of the statute." The 1996 Act does not preempt expressly Georgia law.

Complete preemption inheres where a particular area is so thoroughly covered by federal law that there is nothing left for the state to regulate without running afoul of the federal scheme. *Wisconsin Public Intervenor*, 501 U.S. at 605. The 1996 Act expressly creates room in the telecommunications field for state regulation, and specifically reserves to PSCs the obligation to evaluate interconnection agreements. 47 U.S.C. § 252(e); *BellSouth Telecomm., Inc. v. MCImetro Access Transmission Services, Inc.* 317 F.3d 1270, 1275-77 (11th Cir.2003). Accordingly, the 1996 Act cannot be said to completely preempt the field.

Conflict preemption requires either federal and state laws so irreconcilable that they both cannot physically be obeyed or a state law that obstructs the accomplishment or purpose of a federal law. *Wisconsin Public Intervenor*, 501 U.S. at 605. That situation does not here exist.

The Georgia law "presumption of incorporation" can be reconciled with § 251(b) and (c). The GPSC's position that Georgia law incorporates into a contract all existing law unless specifically opted out by the parties does not preclude parties from exercising their rights under § 252(a)(1). No real tension exists

between the federal statute and common law presumption of incorporation, rather, the Georgia "presumption of incorporation" merely serves to incorporate applicable law even if not expressly stated. In the present case, Georgia law incorporates into the Agreement the entirety of the 1996 Act, which includes § 251(b) and (c), the implementing June 2, 2000 Order, *and* § 252(a)(1). Georgia law presumptively incorporates § 252(a)(1) into the Agreement, and thereby mandates that § 252(a)(1) be given effect. Georgia law is not only reconcilable with § 252(a)(1), the state law mandates the federal law's application.

Georgia law likewise does not obstruct the purpose of § 252(a)(1). The purpose of the 1996 Act, as noted above, is to encourage competition and to prevent incumbent carriers from exercising a natural monopoly by ensuring infrastructure access to competitors. In structure and function, the 1996 Act ensures access to CLECs by one of two routes: either the parties can come to a voluntary agreement, or state agencies can impose an agreement with provisions in accordance with § 251(b) and (c) through arbitration. 47 U.S.C. § 252. Once an agreement is voluntarily reached, state agencies are primarily responsible for approving, interpreting, and enforcing those agreements under state law. 47 U.S.C. § 252(e). Voluntary agreements under § 252(a)(1) are not unrestrained. State commissions are empowered to approve and interpret voluntary agreements, and may coerce agreement where parties fail to agree voluntarily.

***13** The "presumption of incorporation" under Georgia law does not obstruct the purposes of the Act. It does not hinder the federal government's efforts to facilitate competition and does not deny parties the ability to enter into voluntary agreements. Rather, as noted above, the state law mandates the application of the federal statute. Conflict preemption does not apply. The Court holds that the Georgia common law presumption of incorporation is not preempted by the 1996 Act. The GPSC did not err as a matter of federal law by applying the state law presumption of incorporation.

2. *The GPSC's Interpretation of the June 2, 2000 Order*

a. The "Demonstrate a Concern" Requirement

The GPSC concluded that footnote 86 of the June 2, 2000 Order required BellSouth to "demonstrate a concern" before it could audit NuVox. (GPSC Order at 5.)

Read in its entirety and in the appropriate context of the body text that it clarifies, footnote 86 does not impose a requirement that ILECs must demonstrate a concern before an audit may be conducted.

Footnote 86 of the June 2, 2000 Order reads:
The incumbent LEC and competitive LEC signatories ... state that audits will not be routine practice, but will only be undertaken when the incumbent LEC *has a concern* that a requesting carrier has not met the criteria for providing a significant amount of local exchange service. We agree that this should be the only time that an incumbent should request an audit.

June 2, 2000 Order, 15 F.C.C.R. 9587, 9603 n.86 (2000) (citations omitted) (emphasis added).

Footnote 86 clarifies text from ¶ 31 of the June 2, 2000 Order. Paragraph 31 reads: "[I]ncumbent LECs may not require a requesting carrier to submit to an audit *prior to provisioning combinations of unbundled loop and transport network elements.*" *Id.* at 9603 (emphasis added). The text of ¶ 31 forbids an ILEC from conducting an audit prior to providing a CLEC access to unbundled network elements. In other words, the default FCC rule, is that an ILEC cannot require an audit of a CLEC as a condition precedent to provisioning infrastructure access. Paragraph 31 dictates that the ILEC must provision combinations of unbundled network elements to the CLEC without first conducting an audit. In other words, paragraph 31 discusses the timing of audits and forbids PSCs from arbitrating audits as conditions precedent to access.

While footnote 86 provides general guidelines regulating audits and arguably audits conducted after providing infrastructure access, it is not a mandatory provision and seems, at most, to provide guidance to PSCs that are required to arbitrate an audit provision. That is, to the extent PSCs are required to arbitrate an audit provision it suggests-but does not require-that a PSC consider including a showing of concern as a prerequisite to an audit. To interpret footnote 86 to impose an independent "concern" requirement on all ILECs in all cases, including negotiated agreements, is to read a single phrase of the footnote out of context.

***14** Moreover, footnote 86 does not use mandatory language. In footnote 86, the FCC states that ILECs

"*should* " only request audits when they have a concern about non-complying use. This suggestive statement by the FCC does not require that an audit condition be imposed.

The FCC has demonstrated both the will and the ability to use mandatory language when it wishes to issue commands. For example, in the sentence of ¶ 31 clarified by footnote 86, the FCC dictates: "[I]ncumbent LECs *may not* require a requesting carrier to submit to an audit prior to provisioning combinations of unbundled loop and transport network elements." Id. at 9603 (emphasis added). Later in the paragraph, the FCC mandates that:
incumbent LECs *must* provide at least 30 days written notice to a carrier that has purchased a combination of unbundled loop and transport network elements that it will conduct an audit, and *may not* conduct more than one audit of the carrier in any calender year unless the audit finds noncompliance.

Id. at 9604 (emphasis added).

The FCC's use of the suggestive "should" instead of the coercives "must," "shall," or "is required" in footnote 86 is telling. The most reasonable interpretation of the difference in language is that the FCC did not intend the merely suggestive portion to constitute a command.

The June 2, 2000 Order contains further support that the FCC did not intend the phrase "have a concern" in its 86th footnote as a directive. Immediately after the audit discussion in ¶ 31, ¶ 32 emphasizes the LECs' ability to reach voluntary agreements concerning the scope of audit rights. Paragraph 32 states: "As the parties indicate, in many cases, their interconnection agreements already contain audit rights. *We do not believe that we should restrict parties from relying on those agreements.*" *Id.* (emphasis added). This declaration, immediately following ¶ 31, serves both to underscore the rights of the parties under § 252(a)(1) to reach agreements without regard to § 251(b) and (c) and to emphasize the role of the June 2, 2000 Order as a set of guidelines to assist PSCs in their roles as arbiters rather than as a set of generally applicable binding requirements. Indeed, § 251(b) and (c) defer to the preference incorporated in § 252(a)(1), specifically that parties negotiate their interconnection agreements. Sections 251(b) and (c) command arbitration of "open" issues-issues on which parties cannot agree.

The GPSC's interpretation of the June 2, 2000 Order to mandate a "demonstrate a concern" condition for audit rights takes one phrase of a footnote out of context, ignores the suggestive rather than mandatory language chosen by the FCC, defies the emphasis on voluntary agreement found in ¶ 32, and misapprehends the role of the June 2, 2000 Order in the statutory scheme. [FN6]

> FN6. Had NuVox wanted to impose a "have a concern" requirement in the Agreement negotiated under § 252(a)(1), it would have demanded its inclusion. If the parties could not agree on this audit provision, the GPSC could have required it to be arbitrated.
> A "demonstrate a concern" requirement fundamentally changes the nature of the Agreement reached between BellSouth and NuVox. Paragraph 10.5.4 of the Agreement allows BellSouth a limited right to audit NuVox's traffic on BellSouth's EELs. The Agreement states no triggering event or condition preceding BellSouth's right to audit. In fact, under § 10.5.4, BellSouth had no right to complain about NuVox's EEL traffic unless it verified through an audit that NuVox was not providing significant local exchange traffic. The lack of limitation in the audit provision provided significant incentive to NuVox to comply with the local traffic obligation. The "demonstrate a concern" condition imposed by the PSC disrupts this balance.
> Respondents also argue that unless "have" is interpreted as "demonstrate," the "have a concern" language is unenforceable. (NuVox Brief at 33.) The lack of any enforceable obligations in footnote 86 (such as an obligation "to demonstrate") provides further evidence that the FCC did not intend the footnote to impose a mandatory requirement.

b. The Independent Auditor Requirement

The GPSC also held that the June 2, 2000 Order requires BellSouth to use an "independent auditor" (i.e., an AICPA certified auditor) in conducting audits. The GPSC divined this conclusion from ¶ 31 of the June 2, 2000 Order. For many of the reasons stated with respect to the "demonstrate a concern" issue, the GPSC erred by interpreting the June 2, 2000 Order to impose an "independent auditor" requirement.

***15** Paragraph 31 of the June 2, 200 Order reads, in relevant part:

There is broad agreement among the incumbent LECs and the competitive LECs on auditing procedures. In particular, parties agree that incumbent LECs requesting an audit *should* hire and pay for an independent auditor to perform the audit ...

Id. at 9604 (emphasis added).

Like the language of footnote 86, the "independent auditor" language of ¶ 31 is suggestive, not mandatory. As noted above, the FCC demonstrates in the very same paragraph its ability to use mandatory language when it wishes to imposed a mandatory obligation.[FN7]

> FN7. Paragraph 1 of the June 2, 2000 Order does not alter the Court's conclusion. Paragraph 1 states:
>
> [LECs] must allow requesting carriers to self-certify that they are providing a significant amount of local exchange service ... and *we allow* incumbent LECs to subsequently [sic] conduct limited audits by an independent third party to verify the carrier's compliance ...
>
> *Id.* at 9587-88 (emphasis added).
>
> Here again the FCC declines to use the mandatory "must" in reference to the audit process. While LECs "must" allow self-certification, they are not compelled on the issue of audit procedure. The statement "we allow" is interpreted as a permissive rather than limiting statement, particularly in light of the emphasis on voluntary agreement in ¶ 32.

The "independent auditor" suggestion is another guiding, and perhaps even strongly encouraged, principle to assist state PSCs in their role as arbiters of interconnection agreements between disagreeable private parties. That the GPSC would require an independent (AICPA) auditor in a voluntarily negotiated contract suggests that the GPSC sought to impose a general requirement not required by the June 2, 2000 Order. The purpose of the audit that is the subject of paragraph 10.5.4 of this Agreement is to verify "type of traffic being transmitted over combinations of loop and transport network elements." The Agreement does not limit the type of audit permitted to a financial audit, and the nature of the audit suggests that other types of audit might be more appropriate or desired by BellSouth. By requiring BellSouth to use an auditor with an accounting certification, the GPSC and NuVox seek to impose a limitation beyond the scope of the Agreement or the language of the June 2, 2000 Order.

In other words, ¶ 31 of the June 2, 2000 Order does not word its suggestion of an independent auditor as a command.[FN8]

> FN8. That the parties intended to distinguish between mandatory and permissive (or even recommended) requirements of law is underscored by § 35.1 of the Agreement, which provides: "Nothing in this Agreement shall be construed as requiring or permitting either Party to contravene any *mandatory* requirement of Applicable Law." (emphasis added).
>
> Section 35.1 merely serves to reserve the ability of the parties to agree to contract provisions so long as they do not violate mandatory obligations of the law. Contracting parties do this all the time (e.g., contracting parties routinely include provisions on choice-of-law even though state law dictates already what laws will apply to an agreement).

D. *The GPSC'S Interpretation of the Agreement under Georgia Law*

The GPSC argues that Georgia law incorporates into an agreement all pertinent laws. (GPSC Order at 6); (GPSC Brief at 17-18.) The GPSC further argues that Georgia law requires contracts that intend to deviate from the existing law to do so specifically. (*Id.*) Thus, the GPSC concludes that § 251(b) and (c), including the June 2, 2000 Order, are incorporated into the Agreement except where the parties specifically provide otherwise. Because the Agreement does not expressly state that BellSouth is not required to demonstrate a concern or that BellSouth may use a non-independent auditor (and because the GPSC presumes, incorrectly, that the June 2, 2000 Order requires these restrictions), the GPSC concludes that the "concern" and "independent auditor" requirements must be read into the Agreement. This reasoning is seriously flawed, disregards the Georgia law of contracts, and does not provide a reasonable basis for the GPSC's decision.

1. *The GPSC's Application of Georgia Contract Law*

The GPSC argues that Georgia contract law incorporates all existing law into every contract, unless the contract expressly states it will not be incorporated. (GPSC Order at 6); (GPSC Brief at 16-17.) The GPSC refers to *Van Dyck v. Van Dyck*, 429 S.E.2d 914 (1993) and *Jenkins v. Morgan*, 112 S.E.2d 23 (Ga.App.1959) to support this proposition.

***16** The GPSC's statement of Georgia law is not itself arbitrary or capacious. It is well established that "when parties contract, the terms thereof include applicable statutes." *Freeman v. Decatur Loan & Finance Corp.*, 231 S.E.2d. 409, 411 (Ga.App.1976). "The laws which exist at the time and place of the making of a contract, enter into and form a part of it; and the parties must be presumed to have contracted with reference to such laws and their effect on the subject matter." *Satterfield v. Southern Regional Health Care Sys.*, ---S.E.2d.---, 2006 WL 2044694, *1 (Ga.App., July 24, 2006) (incorporating into a hospital-patient contract a Georgia statute that requires hospital rates to be publicly available upon request) (citations omitted). *See also Cox v. Athens Regional Medical Center*, 631 S.E.2d. 792, 797 (Ga.App.2006) (same); *Lay Bros., Inc. v. Golden Pantry Food Stores Inc.*, 616 S.E.2d. 160, 163 (Ga.App.2005) (incorporating into a lease Georgia's legal definition of "trade fixture" to determine that a store canopy was a "store fixture" and could be removed by the lessee without breach).

While the GPSC's statement of the law is correct, its application ignores that very same law, and is both unreasonable and clearly incorrect. The GPSC applied the Georgia law presumption of incorporation inconsistently. It incorporated the substantive obligations of § 251(c) as implemented by the June 2, 2000 Order, but failed to incorporate the provisions and rights under § 252. This selective incorporation is arbitrary and capricious.

The GPSC's error was its failure to recognize that under Georgia law § 252(a)(1) is *also* incorporated into the Agreement. The GPSC ignores that § 252(a)(1) is a federal statute which demands equal force, respect, and recognition as § 251(c). When BellSouth argued to the GPSC that § 252(a)(1) allowed the parties to enter into a voluntary interconnection agreement on terms acceptable to the parties, the GPSC reasoned that the parties could do so only if they specifically and expressly articulated each instance where they intended to alter the law:

> It is one thing to say an agreement that specifies a variance from existing law in one section reflects intent to follow existing law in a different section where no such specification is made, it is quite another to conclude that an agreement that specifies compliance with existing law in one section reflects intent to vary from existing law where no such specification is made.

(GPSC Order at 7.)

The GPSC refused to recognize that § 252(a)(1) entitled BellSouth to fashion an Agreement without a blanket incorporation of the June 2, 2000 Order. BellSouth insisted that the GPSC enforce the rights provided under federal law for voluntarily negotiated interconnection agreements. The GPSC failed to do so.

Section 252(a)(1) operates to suspend the application of 251(b) and (c) (and implementing regulations such as the June 2, 2000 Order) for interconnection agreements negotiated voluntarily. The rights granted by § 252(a)(1) include the right to incorporate or to ignore the provisions of § 251(b) and (c) as the parties choose-a fact which the GPSC purported to recognize but failed to apply. (GPSC Order at 6-7.)

***17** BellSouth and NuVox exercised their right under § 252(a)(1), and negotiated voluntarily their representative interconnection rights. The Agreement shows that BellSouth and NuVox were capable of incorporating discrete sections of the existing law into specific provisions of the Agreement when desired. (*See, e.g.*, Agreement at § § 35.37, 10.2.2, 10.2.4, 10.5.2, 10.5.4.) Such limited incorporations would have been unnecessary had BellSouth and NuVox intended a blanket incorporation of § 251(c). As another example, in § 10.5.4 they spelled out the terms of their negotiated agreement to allow unconditional audits only once a year. (Agreement, § 10.5.4.)

In short, Georgia contract law cannot be applied to pile the provisions of § 251(c) into the Agreement, ignoring § 252(a)(1) and the voluntary contracting rights it protects. Georgia law demands that the Agreement be interpreted with regard to *all* applicable statutory provisions. Section 252(a)(1) grants parties the freedom to contract voluntarily and on their own terms, taking or leaving the provisions of § 251(b) and (c) as they see fit. The GPSC's application of Georgia law ignored several critical factors relevant to its decision-namely the rights secured to the parties by § 251(a)(1) and the clear requirements of the contract law the GPSC purported to apply. The GPSC's decision constituted a clear

error in judgment, and was both unreasonable and contrary to law. The GPSC's application of Georgia law thus was arbitrary and capricious.

2. *The GPSC's Interpretation of the Agreement*

The GPSC also argued that § 35.1 of the Agreement explicitly incorporated the June 2, 2000 Order and other laws:
Each Party shall comply at its own expense with all applicable federal, state, and local statutes, laws, rules, regulations, codes, effective orders, decisions, injunctions, judgments, awards, and decrees that relate to its obligations under this Agreement. Nothing in this Agreement shall be construed as requiring or permitting either Party to contravene any mandatory requirement of Applicable Law ...

(Agreement § 35.1.)

The GPSC asserts this provision proves that the parties did not "intend[ ] to differ from applicable law, but ... state the exact opposite." The GPSC interprets § 35.1 as the foundation for its blanket incorporation of the June 2, 2000 Order. (GPSC Brief at 19.)

a. Relevant Georgia Contract Law

Under Georgia law, the "cardinal rule of contract construction is to ascertain the intention of the parties." *Lay Bros v. Golden Pantry Food,* 616 S.E.2d. 160, 163 (Ga.App.2005) (citations omitted). *See also Johnson v. U.S. Fidelity & Guaranty Co.,* 91 S.E.2d 779, 782 (Ga.App.1956). A contract must be considered as a whole document. *Lay Bros.,* 616 S.E.2d. at 163 ("the whole instrument ... must be considered"). Courts should "avoid any construction that renders portions of the contract meaningless." *RLI Ins. v. Highlands of Ponce, L.L.C.,* ---S.E.2d. ---, 2006 WL 1827456, *4 (Ga.App., July 5, 2006) *citing Holloman v.D.R. Horton, Inc.,* 524 S.E.2d 790, 793 (Ga.App.1999). When a provision of the contract specifically addresses an issue, "it prevails over any conflicting general language." *RLI Ins.,* 2006 WL 1827456 at *4. *See also Versico, Inc. v. Engineered Fabrics Corp.,* 520 S.E.2d. 505, 509 (Ga.App.1999).

***18** Contract interpretation under Georgia law is a stepped process:
(1) Is the language clear and unambiguous? If it is, the court simply enforces the contract according to its terms. If it is ambiguous, (2) the court must apply the rules of contract construction to resolve the ambiguity. If the ambiguity cannot be resolved, (3) the issue of what the ambiguous language means and what the parties intended must be resolved by a jury.

Harris v. Distinctive Builders, Inc., 549 S.E.2d. 496, 498-99 (Ga.App.2001). *See also Hall v. Ross,* 616 S.E.2d. 145, 147 (Ga.App.2005).

Georgia law emphasizes the importance of construing a contract by its terms. "[N]o construction is required *or even permissible* when the language employed by the parties is plain, unambiguous, and capable of only one reasonable interpretation." (emphasis added) (citations omitted). *Cox v. Athens Regional Medical Center,* 631 S.E.2d 792, 796 (Ga.App.2006). A contract is not ambiguous (and thus permissible to be construed) "unless and until an application of pertinent rules of interpretation leaves it uncertain to which of two or more possible meanings represents the true intention of the parties." *Lay Bros v. Golden Pantry Food,* 616 S.E.2d. 160, 163 (Ga.App.2005). Contractual terms are to be accorded their plain and ordinary meaning, and technical terms of art are accorded their meaning in the art. *Johnson v. U.S. Fidelity & Guaranty Co.,* 91 S.E.2d 779, 783 (Ga.App.1956).

The rules of contract construction in Georgia are dictated by statute. In relevant part, Georgia Code § 13-2-2 lays out the following principles "used in arriving at the true interpretation of contracts":
(1) Parol evidence is inadmissable to ... vary a written contract....
Words generally bear their usual and common signification; but technical words, or words of art ... will be construed, generally, to be used in reference to [their] particular meaning....
(4) The construction which will uphold a contract in whole and in every part is to be preferred, and the whole contract should be looked to in arriving at the construction of any part;....

Ga.Code. Ann. § 13-2-2 (2006).

Under Georgia law, Courts are reluctant to imply contractual terms. Implied terms "can only be justified when the implied term is not inconsistent with some express term of the contract and where there arises from the language of the contract itself ... an inference that it is absolutely necessary to introduce the term to effectuate the intention of the parties." *WirelessMD, Inc. v. Healthcare.com Corp.,* 610 S.E.2d 352, 355 (Ga.App.2005). In other words, "[a]n implicit contractual provision exists where such

provision is necessary to effect the full purpose of the contract and is so clearly within the contemplation of the parties that they apparently deemed it unnecessary to state it." *Barger v. Garden Way, Inc.*, 499 S.E.2d 737, 741 (Ga.App.1998).

***19** Georgia law particularly frowns upon implying conditions precedent. Conditions precedent are "not favored," but are "created by language such as 'on condition that,' 'if,' and 'provided,' or by *explicit* statements that certain events are to be construed as conditions precedent. *Hall v. Ross*, 616 S.E.2d. 145, 147 (Ga.App.2005) (emphasis added).

b. The GPSC's Interpretation of the Agreement

The GPSC interpreted § 35.1 of the Agreement to incorporate the June 2, 2000 Order, and, based on that incorporation, implied all of the restrictions and obligations of the June 2, 2000 Order into § 10 .5.4. This interpretation is contrary to basic principles of Georgia law, and is thus arbitrary and capricious.

First, the GPSC failed to identify any ambiguity in the Agreement before engaging in its construction of the Agreement's ultimate meaning beyond the plain language of its provisions. The GPSC expressly recognized that contracts are not to be construed unless found to be ambiguous. (GPSC Order at 7.) ("Unless a contract is ambiguous, a the finder of fact need not look any further than the language in the agreement to determine the intent of the parties."). Directly after stating correctly this principle of law, and without noting any ambiguity in the Agreement, the GPSC Order states, "*Construing* [§ 10.5.4] ... results in the conclusion that BellSouth is obligated to demonstrate a concern." *Id.* (emphasis added).

Because the GPSC did not find any ambiguity in § 10.5.4, it was obligated to interpret the Agreement based on its plain, unambiguous language. Section 10.5.4 states two restrictions on BellSouth's ability to audit NuVox: (1) BellSouth must give NuVox 30 days notice; and (2) BellSouth must pay for the audit. Nowhere do the parties manifest an intention to incorporate the additional restrictions of the June 2, 2000 Order or to imply or impose any other conditions. The parties' decision to include those two restrictions while declining to mention other provisions suggested by the June 2, 2000 Order (such as using an independent auditor and limiting audits to when ILECs have a concern over local exchange carrier traffic amounts) represents an unambiguous intention to include only those two provisions in the Agreement. Even more tellingly, § 10.5.4 incorporates some of the June 2, 2000 Order by reference to the limited purpose of defining the terms of non-compliance, and also tracks the language of ¶ 31 of the June 2, 2000 Order in imposing a once-per-year and thirty-day notice requirements. Section 10.5.4 of the Agreement does not, however, incorporate by reference or otherwise the "demonstrate a concern" or "independent auditor" requirements the June 2, 2000 Order.

In short, the GPSC failed to identify any ambiguity in § 10.5.4, and was accordingly required by Georgia law to interpret the Agreement by its plain language. A plain language interpretation of § 10.5.4 does not impose a "demonstrate a concern" or "independent auditor" requirement on BellSouth's audit right. Nothing in the provision indicates clearly that a condition precedent was meant to be implied. The GPSC's interpretation ignored the requirements of Georgia contract law, which constituted an important factor relevant to its decision. Accordingly, the GPSC's interpretation was arbitrary and capricious.

***20** Under Georgia's statutory scheme of contract construction, contracts are to be construed as a whole and to avoid rendering any provision meaningless. RLI *Ins. v. Highlands of Ponce, L.L.C.*, --- S.E.2d.----, 2006 WL 1827456, *4 (Ga.App., July 5, 2006). *See also Holloman v.D.R. Horton, Inc.*, 524 S.E.2d 790, 793 (Ga.App.1999). When a provision of the contract specifically addresses an issue, "it prevails over any conflicting general language." *Id.*

The provisions of the Agreement contain several limited incorporations of federal law for the purpose of governing or defining limited aspects of specific agreement provisions. (*See, e .g.*, Agreement at § 35.37, § 10.2.2, § 10.2.4, § 10.5.2, § 10.5.4.) If § 35.1 were interpreted to constitute a general incorporation of all relevant federal law, each of the limited incorporation provisions above would be rendered meaningless and redundant.[FN9] Such an interpretation is invaded under Georgia law.

> FN9. By contrast, if § 35.1 were construed to demonstrate a general intent by the parties to comply with (rather than incorporate) the law, then the more limited incorporations later in the contract would retain their meaning.

Section 10.5.4 is a specific provision laying out the parties' audit rights and duties. Section 35.1 is a

generalized provision stating an intention by the parties to comply with the law. To the extent that these provisions conflict, Georgia law dictates that § 10.5.4 prevails.[FN10]

> FN10. The GPSC Order also asserts the testimony of Hamilton B. Russell to prove that NuVox and BellSouth intended to effect a blanket incorporation of the June 2, 2000 Order into § 10.5.4 of the Agreement. (GPSC Order at 8); (GPSC Brief at 30-31.) This assertion violates Georgia contract law in two respects. First, seeking the intent of the agreement outside of the plain language of the contract is impermissible until an ambiguity is found. Second, the testimony of Mr. Russell is parol evidence which is by statute "inadmissible to add to, take from, or vary a written contract." Ga.Code Ann. § 13-2-2. No party claims that the Agreement was not a complete embodiment of the deal struck by the parties. Accordingly, Mr. Hamilton's testimony is not entitled to any weight in determining the intentions of the parties.

On its face, § 10.5.4 is plain and unambiguous. BellSouth reserves the right to conduct an audit if two conditions are met: (1) thirty days notice; and (2) BellSouth pays for it. Nowhere does § 10.5.4 restrict which auditor BellSouth is entitled to use [FN11] or mandate that BellSouth must demonstrate a concern prior to seeking to conduct an audit. NuVox could have contracted for more extensive audit rights. It choose not to do so.

> FN11. BellSouth's Amended Petition appears to take issue only with the requirement of AICPA certification. (First Am. Pet. ¶ 36.) BellSouth's briefing, however, makes the broader argument that there is no "independent auditor" requirement of any kind in the Agreement. (BellSouth Brief at 18.)
> The parties did not raise to the GPSC or to the Court the issue of what requirements the Agreement, properly construed under Georgia law, might impose on BellSouth's audit rights. The parties limited themselves to a discussion of whether the independent auditor requirement from the June 2, 2000 Order was incorporated to the Agreement. While holding that the Agreement does not incorporate the June 2, 2000 Order, the Court expresses no opinion concerning whether the Agreement itself, properly construed under the Georgia law of contracts, might impose some manner of "independence" requirement on the audit right.
> If the parties had understood each other to have interpretations of the Agreement as diametrically opposed as those represented in the briefing, they likely would not have agreed in the first instance. Likewise, if the GPSC had understood § 10.5.4 to impose no requirements whatsoever on the nature of the audits conducted by BellSouth, it might not have approved the Agreement. The GPSC is best suited first to interpret the requirements of the Agreement's audit provision if the meaning of that provision is further disputed by the parties.

III. CONCLUSION

The regulatory scheme here allowed BellSouth and NuVox the prerogative to enter into an interconnection agreement so long as they abided by the requirements set forth by federal law. The parties negotiated their agreement voluntarily. In doing so they specifically acknowledged, based on arms-length negotiation, that they agreed to the following provision of audit rights:
BellSouth may, at its sole expense, and upon thirty (30) days notice to [Nuvox], audit [Nuvox's] records not more than one [sic] [FN12] in any twelvemonth period, unless an audit finds non-compliance with the local usage options referenced in the June 2, 2000 Order, in order to verify the type of traffic being transmitted ...

> FN12. The court interprets this as either "one time" or "once."

To interpret the agreement as urged by NuVox and the GPSC would violate the agreement reached by the parties and impose an obligation that was not expressed by the FCC's June 2, 2000 Order, and it would subvert the agreement that the parties on June 30, 2000 thought was in their best interests.

The GPSC erred as a matter of federal law by interpreting the FCC's June 2, 2000 Order to impose "demonstrate a concern" and "independent auditor" requirement onto BellSouth's right to audit NuVox

under the Agreement. The GPSC also failed to consider important factors relevant to its decision and committed clear error when it ignored Georgia law in its interpretation of the Agreement to effect a blanket incorporation of all of the provisions of the June 2, 2000 Order.

***21** It is hereby **ORDERED** that BellSouth's First Amended Petition for Judicial Review and Complaint for Declaratory and Injunctive Relief [3] is **GRANTEDIN-PART** and **DENIED-IN-PART.**

It is further **ORDERED** that the Court **GRANTS** the Amended Petition by vacating the following findings and orders of the June 29, 2004 and August 24, 2004 Orders issued by the Georgia Public Service Commission:
(1) that the June 2, 2000 Order imposes a "demonstrate a concern" requirement;
(2) that the June 2, 2000 Order imposes an "independent auditor requirement;
(3) that the Agreement requires BellSouth to demonstrate a concern prior to conducting audit; and
(4) that the Agreement requires BellSouth to use an independent auditor.

It is further **ORDERED** that BellSouth's request for injunctive relief is **GRANTED.** Consistent with this Order, the Georgia Public Service Commission and NuVox are enjoined from enforcing those findings of the June 29, 2004 and August 24, 2004 Georgia Public Service Commission Orders that the Agreement incorporated "demonstrate a concern" and "independent auditor" requirements as part of § 10.5.4 of the Agreement.

It is further **ORDERED** that the Court **REMANDS** this matter to the Georgia Public Service Commission for further proceedings consistent with this Order.

SO ORDERED this 12th day of September, 2006.

N.D.Ga.,2006.
Bellsouth Telecommunications, Inc. v. Nuvox Communications, Inc.
Slip Copy, 2006 WL 2617123 (N.D.Ga.)

Briefs and Other Related Documents (Back to top)

• 2005 WL 820250 (Trial Motion, Memorandum and Affidavit) Principal Brief on the Merits of Petitioner Bellsouth Telecommunications, Inc. (Feb. 15, 2005) Original Image of this Document with Appendix (PDF)
• 2004 WL 2658686 (Trial Pleading) First Amended Petition for Judicial Review and Complaint for Declaratory and Injunctive Relief (Sep. 24, 2004) Original Image of this Document with Appendix (PDF)
• 1:04cv02790 (Docket) (Sep. 23, 2004)

END OF DOCUMENT

EXHIBIT B

KELLEY DRYE & WARREN LLP
A LIMITED LIABILITY PARTNERSHIP

WASHINGTON HARBOUR, SUITE 400
3050 K STREET, NW
WASHINGTON, D.C. 20007-5108

(202) 342-8400

FACSIMILE
(202) 342-8451
www.kelleydrye.com

NEW YORK, NY
TYSONS CORNER, VA
CHICAGO, IL
STAMFORD, CT
PARSIPPANY, NJ

BRUSSELS, BELGIUM

AFFILIATE OFFICES
JAKARTA, INDONESIA
MUMBAI, INDIA

DIRECT LINE: (202) 342-8552
EMAIL: mconway@kelleydrye.com

DATE STAMP & RETURN

August 1, 2006

VIA COURIER

PCC/MELLON AUG 01 2006

Marlene H. Dortch, Secretary
Federal Communications Commission
Wireline Competition Bureau – CPD – 214 Appls.
P.O. Box 358145
Pittsburgh, PA 15251-5145

PCC/MELLON AUG 01 2006

Re: Application of Xspedius Communications, LLC for a Transfer of Control Involving Authorized International and Domestic Carriers

Dear Ms. Dortch:

Xspedius Communications, LLC, on behalf of itself and its subsidiaries, and Time Warner Telecom Inc. (collectively, "Applicants") hereby file the above-referenced application. Enclosed please find an original and six (6) copies of the application.

Also enclosed is a completed Fee Remittance Form 159 and a check in the amount of $895.00 to cover the requisite filing fee required for this application.

Pursuant to Section 63.04(b) of the Commission's Rules, Applicants submit this filing as a combined international Section 214 transfer of control application and domestic Section 214 transfer of control application ("Combined Application"). Applicants have filed the Combined Application with the International Bureau through the IBFS filing system.

Please date-stamp the stamp-and-return copy upon receipt and return it to the courier. Should you have any questions with respect to this filing, please contact Melissa Conway at (202) 342-8552.

Respectfully Submitted,

Melissa Conway

Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
XSPEDIUS COMMUNICATIONS, LLC,	)	**WC Docket No. 06-___**
On behalf of itself and its subsidiaries	)	
	)	**File Nos. ITC-T/C-___**
	)	
	)	
Application for Consent to Transfer	)	
Control of Companies Holding	)	
International Authorizations and/or Blanket	)	
Domestic Authorizations Pursuant	)	
to Section 214 of the Communications Act	)	
of 1934, as Amended	)	

APPLICATION

Xspedius Communications, LLC ("Xspedius Parent") (FRN: 0009-0660-02), on behalf of itself and its subsidiaries, and Time Warner Telecom Inc. ("Time Warner Telecom") (FRN: 0015-3381-22) (Xspedius Parent and Time Warner Telecom, together, the "Parties" or "Applicants") hereby request authority pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. §214 (the "Act"), and Sections 63.03, 63.04 and 63.24(e) of the Commission's Rules, 47 CFR §§ 63.03, 63.04, 63.24(e), to transfer control of Xspedius Parent and its subsidiaries listed in footnote 5 herein ("Xspedius Certificated Subsidiaries") as a result of the acquisition of Xspedius Parent by Time Warner Telecom.[1]

---

1 Time Warner Telecom has a number of subsidiaries that also are authorized to provide telecommunications services in various states. These entities are not affected by the proposed transfer of control described herein. They will continue to operate pursuant to their existing authorizations and their existing ownership.

Pursuant to the terms of an Agreement and Plan of Merger ("Agreement") dated July 27, 2006 among Time Warner Telecom, Xspedius Parent and various affiliated entities,[2] as described in more detail below, Time Warner Telecom will acquire the membership interests of Xspedius Parent. As a result, Xspedius Parent and the Xspedius Certificated Subsidiaries (collectively, "Xspedius") will become wholly-owned subsidiaries of Time Warner Telecom. Accordingly, the Applicants request that the Commission approve the transfer of control of Xspedius to Time Warner Telecom. The proposed Transaction is not expected to result in any loss or impairment of service to any of the customers of Xspedius. Customers will continue to receive their existing services at the same rates, terms and conditions as at present from their existing service providers. Any future changes will be made consistent with applicable Commission requirements.

The Parties respectfully request streamlined treatment of this Application pursuant to Sections 63.03 and 63.12 of the Commission's Rules, 47 C.F.R. §§ 63.03 and 63.12. This Application is eligible for streamlined processing pursuant to Section 63.03(b)(2) of the Commission's Rules, 47 C.F.R. § 63.03(b)(2), because: (1) after the proposed transaction, Time Warner Telecom and affiliates will have market share in the interstate, interexchange market of less than 10 percent, and will provide competitive services exclusively in areas served by a dominant local carrier not a party to the Transaction, and (2) neither the Applicants nor any of their affiliates are regulated as dominant with respect to any service. This Application also qualifies for streamlined treatment under Section 63.12 because, in accordance with Section 63.12(c): (1) Xspedius is not affiliated with a dominant foreign carrier, (2) Xspedius will not become

[2] The affiliated entities are XPD Acquisition, LLC, Xspedius Management Co., LLC and Xspedius Holding Corp.

affiliated with any foreign carrier as a result of the proposed transaction, and (3) none of the other provisions contained in Section 63.12(c) of the Commission's Rules, 47 C.F.R. §63.12, apply.

I. APPLICANTS

A. Time Warner Telecom, Inc.

Through its operating subsidiaries, Time Warner Telecom Inc. ("Time Warner Telecom") (NASDAQ:TWTC), a publicly held Delaware corporation headquartered in Littleton, Colorado, is a leading provider of voice and/or data networking solutions to business customers in 25 states and 44 U.S. metropolitan areas. Time Warner Telecom also supplies dedicated Internet access, and local and long distance voice services for long distance carriers, wireless communications companies, incumbent local exchange carriers and enterprise organizations in the healthcare, finance, higher education, manufacturing and hospitality industries. As of March 31, 2006, Time Warner Telecom's fiber networks covered 13,913 local route miles and 7,015 regional route miles. Time Warner Telecom continues to expand its IP backbone data networking capability between markets supporting end-to-end Ethernet connections for customers, and have selectively interconnected existing service areas within regional clusters with fiber optic facilities that it owns or leases from other carriers. More information about Time Warner Telecom can be found at www.twtelecom.com.

Time Warner Telecom's operating subsidiaries offer local and long distance telecommunications services in 25 states.[3] As noted above, immediately after closing of

[3] Operating subsidiaries of Time Warner Telecom are authorized to provide telecommunications services in the following states: Arizona, California, Colorado, Florida, Georgia, Hawaii, Idaho, Illinois,

the Transaction, Time Warner Telecom and its subsidiaries will continue to operate under their same names, tariffs, rates, contract terms and conditions as at present. Time Warner Telecom holds international global or limited global facilities-based and resold Section 214 authority from the Commission (ITC-214-20000927-00570, granted on October 27, 2000), as well as domestic interstate blanket Section 214 authority.

A diagram showing the current corporate structure of Time Warner Telecom and its operating subsidiaries is appended hereto as **Exhibit A.**

As described in more detail below, there is one (1) entity that will continue to directly own 10% or more of the equity of Time Warner Telecom upon consummation of the Transaction: Time Warner Inc. ("TWX"). TWX is a leading media and entertainment company, whose businesses include interactive services, cable systems, filmed entertainment, television networks and publishing. TWX's cable segment and operating subsidiaries provide local and long distance IP voice services over cable systems and associated facilities. The TWX subsidiaries are certified competitive local exchange carriers in 26 states and have pending applications in 3 states.[4] Through its operating subsidiaries, TWX provides IP voice services in 13 states.[5]

Indiana, Kentucky, Minnesota, Mississippi, New Jersey, New York, Nevada, New Mexico, North Carolina, Ohio, Oregon, South Carolina, Tennessee, Texas, Utah, Washington and Wisconsin.

4 Alabama (pending), Arizona, Arkansas, California, Florida, Georgia (pending), Hawaii, Indiana, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey (pending), New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, West Virginia and Wisconsin.

5 California, Georgia, Hawaii, Maine, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Ohio, South Carolina, Texas and Wisconsin.

B. Xspedius Communications, LLC

Xspedius Communications, LLC ("Xspedius Parent") is a Delaware limited liability company that is privately-held and located at 5555 Winghaven Boulevard, O'Fallon, Missouri 63368-3626. Xspedius provides advanced, integrated telecommunications services targeted to small and medium-sized business customers, including local and long distance telephone services in combination with enhanced communication features. Xspedius Certificated Subsidiaries currently offer competitive local and long distance telecommunications services in 20 states, and the District of Columbia, operating 2,800 fiber route miles (as of March 31, 2006) in 43 markets.[6] Aside from the Xspedius Certificated Subsidiaries listed in footnote 5, Xspedius Parent does not have any other affiliates that offer domestic telecommunications services.

Xspedius Parent holds an international Section 214 license, ITC-214-20010326-00153, granted April 18, 2001, to provide global and limited facilities-based and resold services. A subsidiary of Xspedius Parent, Xspedius Management Co. International,

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6 The following wholly-owned subsidiaries of Xspedius Parent provide intrastate telecommunications services in Alabama, Arizona, Arkansas, Colorado, DC, Florida, Georgia, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Nevada, New Mexico, Oklahoma, South Carolina, Tennessee, Texas and Virginia: Xspedius Management Co. Switched Services, LLC, Xspedius Management Co. International, LLC, Xspedius Management Co. of Birmingham, LLC, Xspedius Management Co. of Mobile, LLC, Xspedius Management Co. of Montgomery, LLC, Xspedius Management Co. of Atlanta, LLC, Xspedius Management Co. of Lexington, LLC, Xspedius Management Co. of Louisville, LLC, Xspedius Management Co. of Chattanooga, LLC, Xspedius Management Co. of Albuquerque, LLC, Xspedius Management Co. of Austin, LLC, Xspedius Management Co. of Baton Rouge, LLC, Xspedius Management Co. of Charleston, LLC, Xspedius Management Co. of Colorado Springs, LLC, Xspedius Management Co. of Columbia, LLC, Xspedius Management Co. of D.C., LLC, Xspedius Management Co. of Dallas/Fort Worth, LLC, Xspedius Management Co. of El Paso, LLC, Xspedius Management Co. of Fort Worth, LLC, Xspedius Management Co. of Greenville, LLC, Xspedius Management Co. of Irving, LLC, Xspedius Management Co. of Jackson, LLC, Xspedius Management Co. of Jacksonville, LLC, Xspedius Management Co. of Kansas City, LLC, Xspedius Management Co. of Las Vegas, LLC, Xspedius Management Co. of Little Rock, LLC, Xspedius Management Co. of Louisiana, LLC, Xspedius Management Co. of Maryland, LLC, Xspedius Management Co. of Pima County, LLC, Xspedius Management Co. of San Antonio, LLC, Xspedius Management Co. of Shreveport, LLC, Xspedius Management Co. of South Florida, LLC, Xspedius Management Co. of Spartanburg, LLC, Xspedius Management Co. of Tampa, LLC, Xspedius Management Co. of Tulsa, LLC, Xspedius Management Co. of Virginia, LLC.

LLC, also holds an international Section 214 license, ITC-ASG-2002071 1, granted August 16, 2002. Xspedius Management Co. International, LLC hereby voluntarily surrenders its international Section 214 license and notifies the Commission that it will operate pursuant to the Section 214 license of its immediate parent, Xspedius Parent.[7]

A diagram showing the current corporate structure of Xspedius is provided in Exhibit B.

II. DESCRIPTION OF THE TRANSACTION

The Agreement provides that Xspedius Parent will become a wholly owned subsidiary of Time Warner Telecom. To facilitate this transaction, Time Warner Telecom has created a wholly owned subsidiary called XPD Acquisition, LLC ("XPD"), a Delaware limited liability company that was established for the purpose of completing the transfer of control transaction and other transactions contemplated by the Agreement. Pursuant to the Agreement, XPD will merge with and into Xspedius Parent, with Xspedius Parent continuing as the surviving corporation and as a wholly owned subsidiary of Time Warner Telecom (the "Transaction").

At the time of the Transaction, all of the ownership interests of Xspedius Parent immediately prior to the Transaction shall cease to exist in exchange for consideration consisting of Time Warner Telecom stock and cash received by the owners of Xspedius Parent. As a result of XPD merging into Xspedius Parent, Time Warner Telecom will own 100% of the membership interests of Xspedius Parent. The surviving parent company of the Xspedius Certificated Subsidiaries is Xspedius Parent. Consummation of

[7] As a result of prior transactions, Xspedius held a duplicative international 214 license and is taking this opportunity to surrender that redundant license.

the Transaction is contingent on the receipt of the required regulatory approvals, among other things.

The proposed Transaction does not involve the transfer of any operating authority, assets, or customers. Immediately following the closing, the Xspedius Certificated Subsidiaries and the Time Warner Telecom operating subsidiaries will continue to offer to their customers the same services at the same rates, terms and conditions as at present pursuant to existing authorizations, tariffs, contracts, and published rates and charges. Accordingly, the contemplated Transaction will be generally transparent to consumers. The only change will be that Xspedius will be under the common control of Time Warner Telecom. The combined company will continue to assess the benefits of post-close consolidations, market coverage and/or mergers of the operating entities. When and if the combined company determines that it will pursue such plans, it will seek all appropriate regulatory approvals.

A diagram showing the corporate structure of Time Warner Telecom and its subsidiaries post-close is provided in **Exhibit C**.

III. PUBLIC INTEREST STATEMENT

The proposed Transaction will serve the public interest. Xspedius Parent and Time Warner Telecom, and their respective subsidiaries, as a combined company, will be better equipped to devote resources to introducing new products and services, and expanding service offerings in their service territories. Time Warner Telecom's acquisition of Xspedius will invigorate Xspedius and allow it the financial resources necessary for it to continue to provide high quality services and aggressively compete for customers. The combined organization will benefit from increased economies of scale

that will permit them to operate more efficiently and thus realize substantial financial synergies that should enable the combined organization to increase their operating income and free cash flow. The Transaction should achieve significant annualized cost synergies of approximately $40 to $50 million, within 12 to 18 months of closing, by leveraging existing local and regional operating structures and optimizing network capabilities and costs. The combination of Time Warner Telecom and Xspedius thus will promote competition in the provision of telecommunications services.

The Applicants believe that the integration of the Time Warner Telecom and Xspedius networks will allow the combined company to improve delivery of services to customers, reduce network costs, improve operating results and better compete head to head with other telecommunications companies in the nationwide local telecommunications services markets. The post-close Time Warner Telecom will solidify Time Warner Telecom's position as one of the nation's largest independent competitive providers of national local telecommunications and broadband services, serving 75 markets. As such, the Transaction will strengthen an independent national competitor which will inure to the benefit of both existing and prospective Time Warner Telecom and Xspedius customers. In light of the recent Regional Bell Operating Company megamergers – Verizon/MCI and AT&T/SBC/BellSouth - CLECs such as Time Warner Telecom and Xspedius need to expand to a size that will allow them to compete with the vast resources of these new megacompanies. For example, even after the Transaction, Time Warner Telecom will be less than 1% of the size by revenues of the projected AT&T/SBC/BellSouth combination.

Further, immediately after consummation of the Transaction, the Xspedius Certificated Subsidiaries will continue to provide service to current customers without material change in rates, terms or conditions of service. Therefore, the Transaction will be virtually transparent to Xspedius customers. Any future changes in the entities providing service, their tariffs or names would be effected in accordance with all applicable Commission requirements.

At the same time, the proposed Transaction does not present any anti-competitive issues. Customers of Xspedius will continue to receive high-quality telecommunications and information services without interruption and without change in rates, terms or conditions. The Xspedius Subsidiaries are non-dominant carriers that will continue to compete with at&t and Verizon as well as other CLECs in the local and long distance markets. In the geographic markets in which the operations of the combined organization overlap, there are a number of other CLECs – including, but not limited to, BridgeCom/Broadview, Eschelon, PAETEC, Telcove, Cbeyond, US LEC and XO -- operating in these markets, as well as the incumbent carriers, at&t, BellSouth, Qwest and Verizon.

IV. INFORMATION REQUIRED BY SECTION 63.24(e) OF THE COMMISSION'S RULES

In support of this Application, the Applicants submit the following information pursuant to Section 63.24(e) of the Commission's Rules, including the information requested in Section 63.18:

(a) Name, address and telephone number of Applicants:

Time Warner Telecom Inc. ("Time Warner Telecom") (transferee)
10475 Park Meadows Drive
Littleton, CO 80124
Tel: (303) 566-1000

Xspedius Communications, LLC ("Xspedius Parent") (transferor)
5555 Winghaven Boulevard
O'Fallon, MO 63368-3626
Tel: (301) 361-4298

(b) Time Warner Telecom is a Delaware corporation. Xspedius Parent is a Delaware limited liability company.

(c) Correspondence concerning this Application should be sent to:

Brad E. Mutschelknaus
Melissa S. Conway
Kelley Drye & Warren LLP
3050 K Street, Suite 400
Washington, D.C. 20007-5108
Tel: (202) 342-8552
Fax: (202) 342-8451
mconway@kelleydrye.com

Counsel for Applicants

Paul Jones SVP, General Counsel and Regulatory Policy Time Warner Telecom Inc. 10475 Park Meadows Drive, Suite 400 Littleton, CO 80124 Paul.Jones@twtelecom.com Rochelle Jones Vice President, Regulatory Time Warner Telecom Inc. 14 Wall Street, 9th Floor New York, New York 10005 Rochelle.Jones@twtelecom.com	Lawrence P. Beilenson SVP & General Counsel Xspedius Communications, LLC 5555 Winghaven Blvd., Ste 300 O'Fallon, MO 63368-3626 Larry.Beilenson@xspedius.com James C. Falvey SVP, Regulatory Affairs Xspedius Communications, LLC 14405 Laurel Place Suite 200 Laurel, MD 20707-6102 Jim.Falvey@xspedius.com

(d) Xspedius ~~Parent holds~~ an ~~international~~ Section 214 license, ITC-214-20010326-00153, granted April 18, 2001, to provide global and limited facilities-based and resold services. A subsidiary of Xspedius Parent, Xspedius Management Co. International, LLC, also holds an international Section 214 license, ITC-ASG-20020711, granted August 16, 2002. Xspedius Management Co. International, LLC hereby voluntarily surrenders its international Section 214 license and notifies the Commission that it will operate pursuant to the Section 214 license of its immediate parent, Xspedius Parent. Time Warner Telecom holds international global or limited global facilities-based and resold Section 214 authority from the Commission (ITC-214-20000927-00570, granted on October 27, 2000).

(h) Following consummation of the Transaction, Xspedius Parent will remain the 100% parent company owner of the Xspedius Certificated Subsidiaries. As described above, Time Warner Telecom will own 100% of the membership interests of Xspedius Parent upon consummation of the Transaction.

The following entity will directly own 10% or greater of the equity of Time Warner Telecom:

Name:	Time Warner Inc. ("TWX")
Address:	One Time Warner Center New York, New York 10019
Citizenship:	Delaware
Principal Business:	Media and entertainment
Percent Ownership:	23.5%

TWX is a publicly held company. No investor in TWX owns a 10% or greater indirect interest in Xspedius Parent under the Commission's attribution rules.

No other person or entity will hold a 10% or greater direct or indirect interest in Xspedius Parent under the Commission's attribution rules.

Following consummation of the proposed Transaction, there will be no interlocking directorates with any foreign carrier.

(i) As evidenced by the signatures to this Application, Time Warner Telecom certifies that following consummation of the proposed Transaction, Time Warner Telecom will not be a foreign carrier and will not be affiliated with a foreign carrier.

(j) As evidenced by the signatures to this Application, Time Warner Telecom certifies that through its acquisition of Xspedius Parent, it does not seek to provide international telecommunications services to any destination country where, once the Transaction closes, (i) Time Warner Telecom is a foreign carrier; (ii) Time Warner Telecom controls a foreign carrier; (iii) any entity that owns more than 25% of Time Warner Telecom, or that controls Time Warner Telecom, controls a foreign carrier in that country; or (iv) two or more foreign carriers (or parties that control foreign carriers) own, in the aggregate, more than 25 percent of Time Warner Telecom and are parties to, or the beneficiaries of, a contractual relationship affecting the provisioning or marketing of international basic telecommunications services in the United States.

(k) Not applicable.

(l) Not applicable.

(m) Time Warner Telecom qualifies for a presumption of non-dominance under Section 63.10(a)(1) as it is not a foreign carrier, nor is it affiliated with a foreign carrier.

(n) As evidenced by the signatures to this Application, Time Warner Telecom certifies that it has not agreed to accept special concessions directly or indirectly from any foreign carrier with respect to any U.S. international route where the foreign carrier possesses market power on the foreign end of the route, and that it will not enter into such agreements in the future.

(o) As evidenced by the signatures to this Application, the Applicants certify, pursuant to Sections 1.2001 through 1.2003 of the Commission's Rules, that they are not subject to a denial of Federal benefits pursuant to Section 5301 of the Anti-Drug Abuse Act of 1988.

(p) Applicants request streamlined processing of this Application pursuant to Section 63.12 of the Commission's Rules, 47 C.F.R. § 63.12. This Application

qualifies for streamlined treatment under Section 63.12 because, in accordance with Section 63.12(c): (i) Time Warner Telecom is not affiliated with a dominant foreign carrier; (ii) Time Warner Telecom will not become affiliated with a dominant foreign carrier; and (iii) none of the other scenarios outlined in Section 63.12(c) of the Commission's Rules apply.

V. INFORMATION REQUIRED BY SECTION 63.04(b) OF THE COMMISSION'S RULES

In accordance with the requirements of Section 63.04(b) of the Commission's Rules, the additional information required for the domestic Section 214 transfer of control application is provided in **Exhibit D**.

VI. CONCLUSION

Based on the foregoing, Applicants respectfully submit that the public interest, convenience, and necessity would be furthered by grant of this Application.

Respectfully submitted,

Xspedius Communications, LLC

Lawrence P. Beilenson
SVP & General Counsel
Xspedius Communications, LLC
5555 Winghaven Boulevard
Suite 300
O'Fallon, MO 63368-3626

Time Warner Telecom Inc.

Paul Jones
SVP, General Counsel and
Regulatory Policy
Time Warner Telecom Inc.
10475 Park Meadows Drive
Suite 400
Littleton, CO 80124

Brad E. Mutschelknaus
Melissa Conway
Kelley Drye & Warren LLP
3050 K Street NW
Suite 400
Washington, DC 20007
mconway@kelleydrye.com

Counsel to Xspedius Communications, Inc. and Time Warner Telecom Inc.

Date: August 1, 2006

VI. CONCLUSION

Based on the foregoing, Applicants respectfully submit that the public interest, convenience, and necessity would be furthered by grant of this Application.

Respectfully submitted,

Xspedius Communications, LLC

Lawrence P. Beilenson
SVP & General Counsel
Xspedius Communications, LLC
5555 Winghaven Boulevard
Suite 300
O'Fallon, MO 63368-3626

Time Warner Telecom Inc.

Paul Jones
SVP, General Counsel and
Regulatory Policy
Time Warner Telecom Inc.
10475 Park Meadows Drive
Suite 400
Littleton, CO 80124

Brad E. Mutschelknaus
Melissa Conway
Kelley Drye & Warren LLP
3050 K Street NW
Suite 400
Washington, DC 20007
mconway@kelleydrye.com

Counsel to Xspedius Communications, Inc. and Time Warner Telecom Inc.

Date: August 1, 2006

LIST OF EXHIBITS

EXHIBIT A	Pre Merger Structure of Xspedius
EXHIBIT B	Pre Merger Structure of Time Warner Telecom and Subsidiaries
EXHIBIT C	Proposed Post Merger Structure of Time Warner Telecom and Subsidiaries
EXHIBIT D	Domestic Section 214 Transfer of Control Information

Exhibit A

Xspedius Communications Structure
Pre Merger Structure

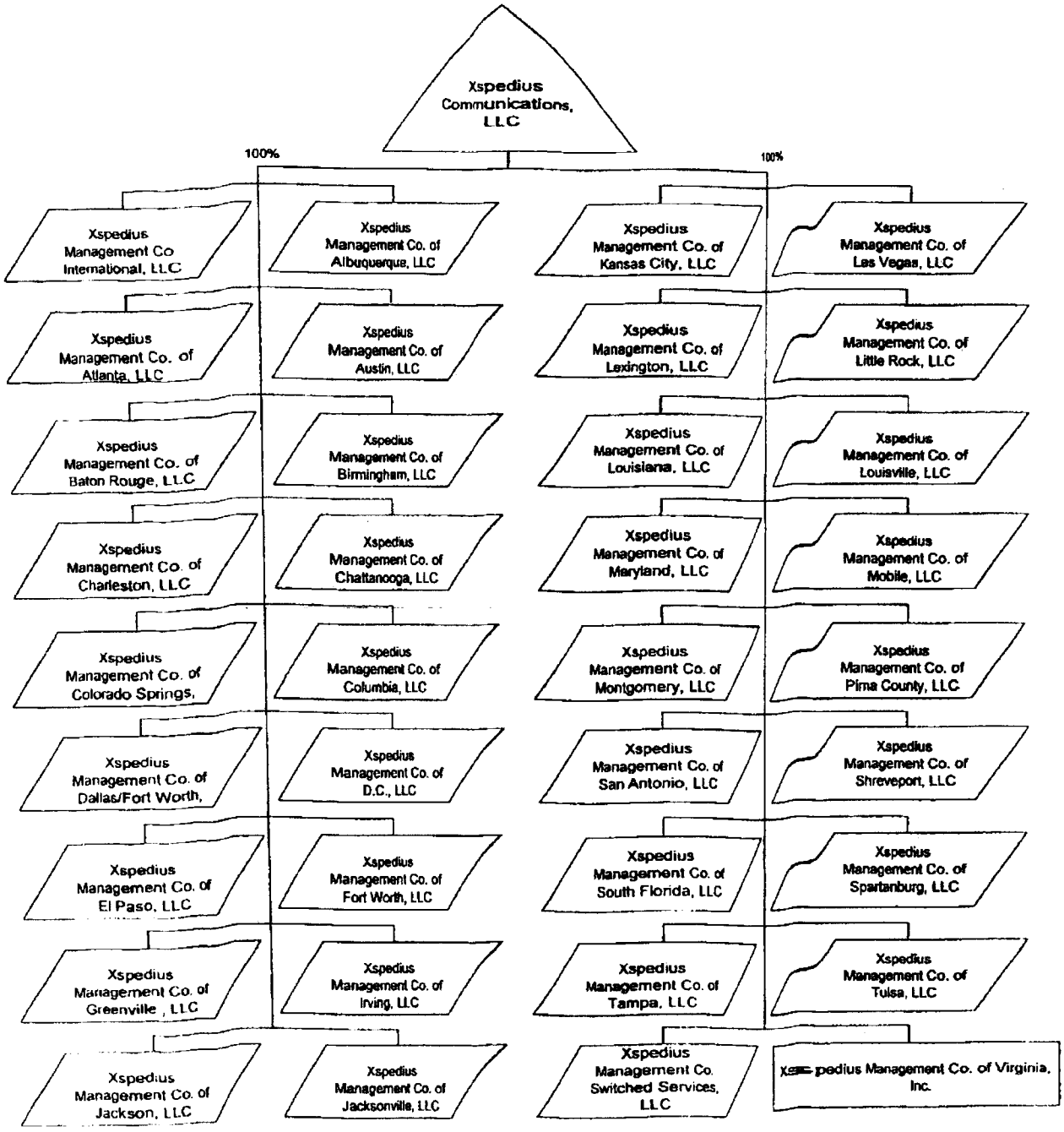
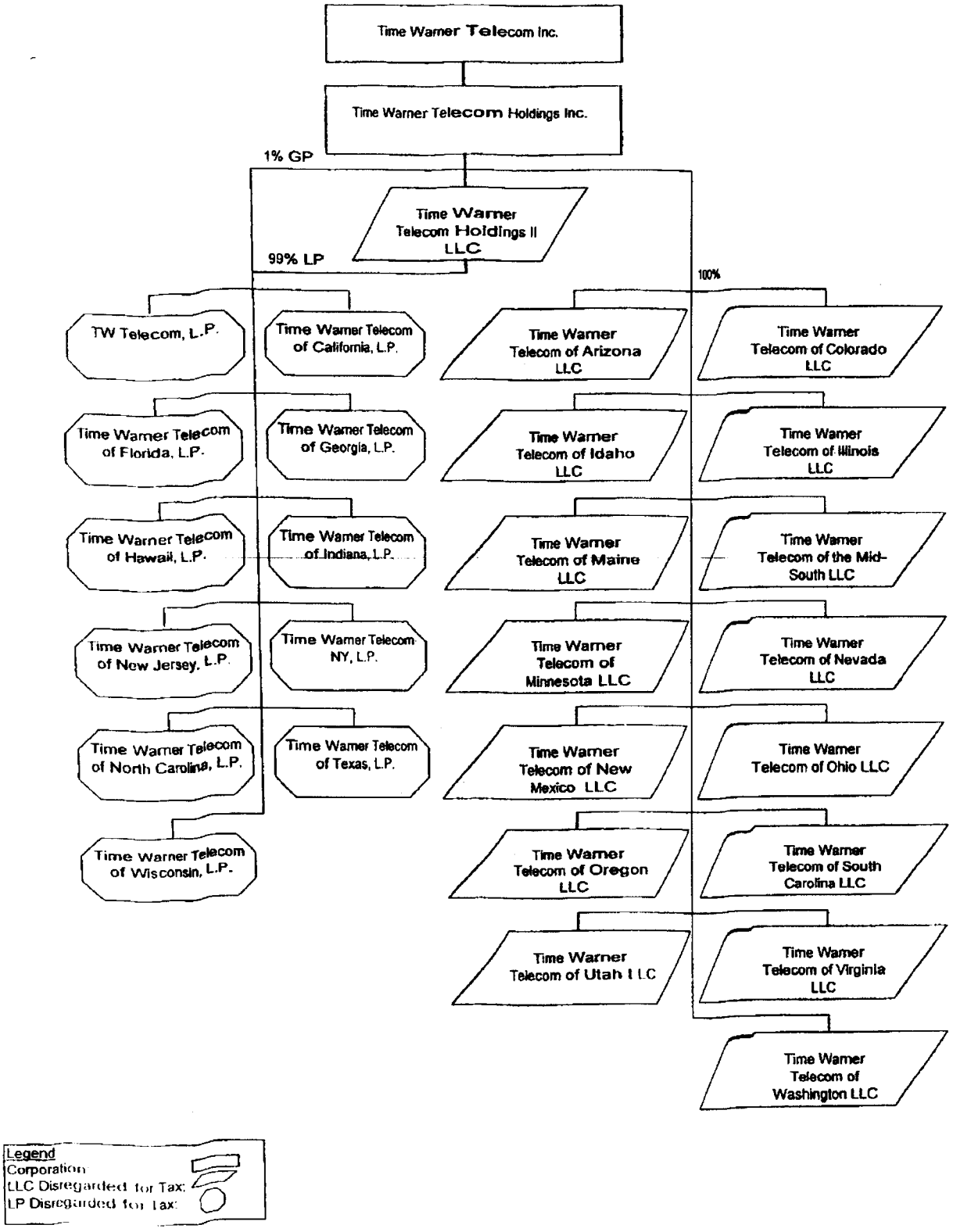


Exhibit B

Time Warner Telecom Inc. & Subsidiaries
Pre Merger Structure



Legend
Corporation
LLC Disregarded for Tax
LP Disregarded for Tax

Exhibit C

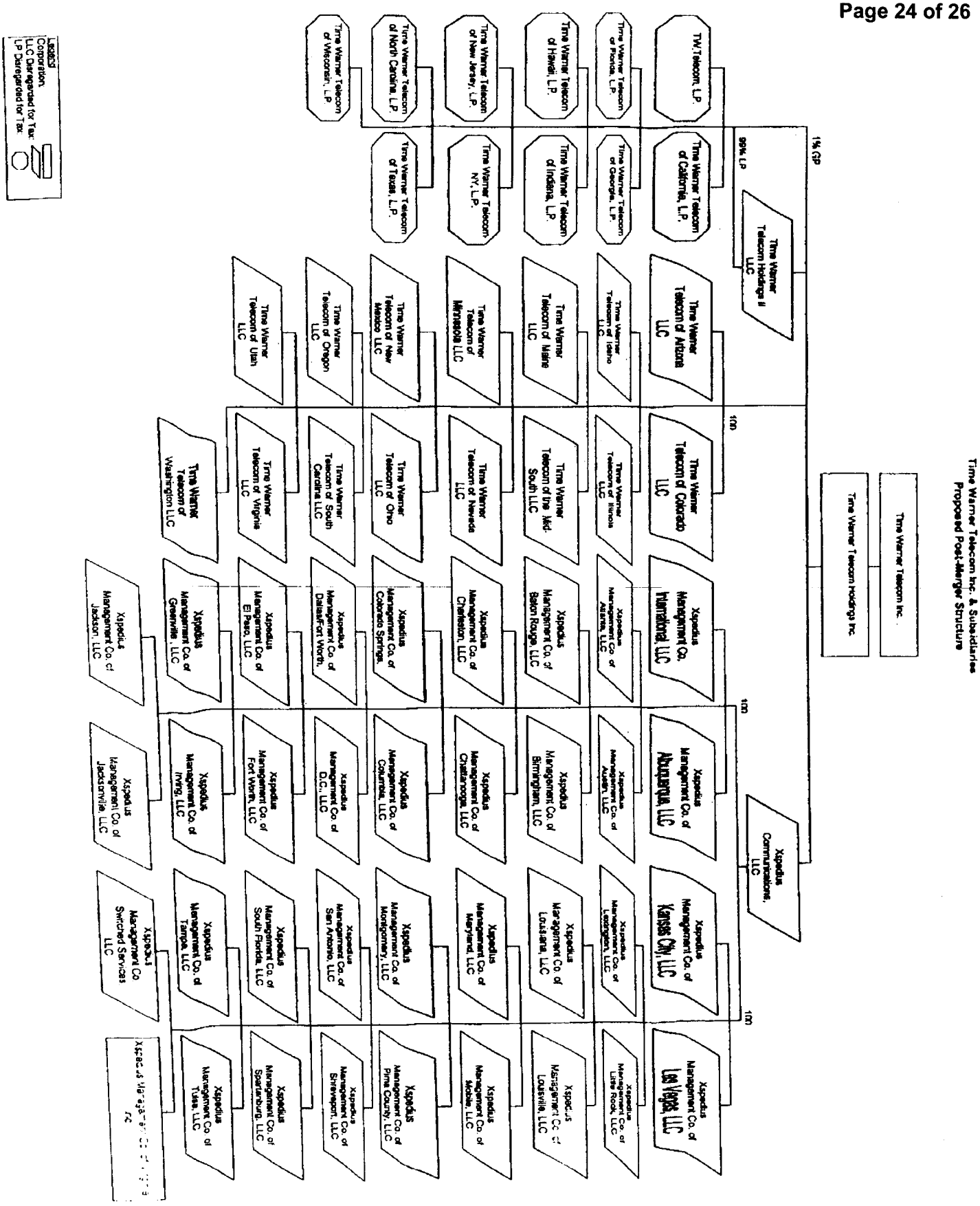

Time Warner Telecom Inc. & Subsidiaries
Proposed Post-Merger Structure
Time Warner Telecom Inc.
Time Warner Telecom Holdings Inc.
1% GP
99% LP
100
Time Warner Telecom Holdings II LLC
TW Telecom, L.P.
Time Warner Telecom of Florida, L.P.
Time Warner Telecom of Hawaii, L.P.
Time Warner Telecom of New Jersey, L.P.
Time Warner Telecom of North Carolina, L.P.
Time Warner Telecom of Wisconsin, L.P.
Time Warner Telecom of California, L.P.
Time Warner Telecom of Georgia, L.P.
Time Warner Telecom of Indiana, L.P.
Time Warner Telecom NY, L.P.
Time Warner Telecom of Texas, L.P.
Time Warner Telecom of Idaho LLC
Time Warner Telecom of Illinois LLC
Time Warner Telecom of Maine LLC
Time Warner Telecom Minnesota LLC
Time Warner Telecom of New Mexico LLC
Time Warner Telecom of Oregon LLC
Time Warner Telecom of Utah LLC
Time Warner Telecom of Virginia LLC
Time Warner Telecom of Washington LLC
Time Warner Telecom of Arizona LLC
Time Warner Telecom of Colorado LLC
Time Warner Telecom of the Mid-South LLC
Time Warner Telecom of Nevada LLC
Time Warner Telecom of Ohio LLC
Time Warner Telecom of South Carolina LLC
Xspedius Management Co. International, LLC
Xspedius Management Co. of Albuquerque, LLC
Xspedius Management Co. of Austin, LLC
Xspedius Management Co. of Atlanta, LLC
Xspedius Management Co. of Baton Rouge, LLC
Xspedius Management Co. of Birmingham, LLC
Xspedius Management Co. of Chattanooga, LLC
Xspedius Management Co. of Charleston, LLC
Xspedius Management Co. of Columbia, LLC
Xspedius Management Co. of Colorado Springs, LLC
Xspedius Management Co. of Dallas/Fort Worth, LLC
Xspedius Management Co. of D.C., LLC
Xspedius Management Co. of El Paso, LLC
Xspedius Management Co. of Fort Worth, LLC
Xspedius Management Co. of Greenville, LLC
Xspedius Management Co. of Irving, LLC
Xspedius Management Co. of Jackson, LLC
Xspedius Management Co. of Jacksonville, LLC
Xspedius Communications, LLC
Xspedius Management Co. of Kansas City, LLC
Xspedius Management Co. of Lexington, LLC
Xspedius Management Co. of Louisiana, LLC
Xspedius Management Co. of Maryland, LLC
Xspedius Management Co. of Montgomery, LLC
Xspedius Management Co. of San Antonio, LLC
Xspedius Management Co. of South Florida, LLC
Xspedius Management Co. of Tampa, LLC
Xspedius Management Co Switched Services LLC
Xspedius Management Co. of Las Vegas, LLC
Xspedius Management Co. of Little Rock, LLC
Xspedius Management Co. of Louisville, LLC
Xspedius Management Co. of Mobile, LLC
Xspedius Management Co. of Pima County, LLC
Xspedius Management Co. of Shreveport, LLC
Xspedius Management Co. of Spartanburg, LLC
Xspedius Management Co. of Tulsa, LLC
Legend
Corporation
LLC Disregarded for Tax
LP Disregarded for Tax

EXHIBIT D

DOMESTIC SECTION 214 TRANSFER OF CONTROL INFORMATION

In accordance with the requirements of Section 63.04(b) of the Commission's Rules, 47 C.F.R. § 63.04, the Applicants provide the following information in support of their request.

63.04(b)(6): Description of the Transaction

The proposed Transaction is described in Section II of the Application.

63.04(b)(7): Description of Geographic Service Area and Services in Each Area

A description of the geographic service areas and services provided in each area is described in Section I of the Application.

63.04(b)(8): Presumption of Non-Dominance and Qualification for Streamlining

This Application is eligible for streamlined processing pursuant to Section 63.03(b)(2) of the Commission's Rules, 47 C.F.R. § 63.03(b)(2), because following consummation of the proposed Transaction, Time Warner Telecom and affiliates will have market share in the interstate, interexchange market of less than 10 percent, and will provide competitive services exclusively in areas served by a dominant local exchange carrier that is not party to the Transaction. Finally, neither the Applicants nor any of their affiliates are regulated as dominant with respect to any service.

63.04(b)(9): Other Pending Commission Applications Concerning the Proposed Transaction

None.

63.04(b)(10): Special Considerations

None.

63.04(b)(11): Waiver Requests (If Any)

None.

63.04(b)(12): Public Interest Statement

The proposed transaction is in the public interest for the reasons detailed in Section III of the Application.

STATE OF SOUTH CAROLINA)
) CERTIFICATE OF SERVICE
COUNTY OF RICHLAND)

The undersigned, Nyla M. Laney, hereby certifies that she is employed by the Legal Department for BellSouth Telecommunications, Inc. ("BellSouth") and that she has caused BellSouth's Response to Joint Petitioners' Petition for Reconsideration in Docket No. 2005-57-C to be served upon the following this November 2, 2006:

Florence P. Belser, Esquire
General Counsel
Office of Regulatory Staff
Post Office Box 11263
Columbia, South Carolina 29211
(U. S. Mail and Electronic Mail)

Nanette S. Edwards, Esquire
Office of Regulatory Staff
Post Office Box 11263
Columbia, South Carolina 29211
(U. S. Mail and Electronic Mail)

F. David Butler, Esquire
Senior Counsel
S. C. Public Service Commission
Post Office Box 11649
Columbia, South Carolina 29211
(PSC Staff)
(U. S. Mail and Electronic Mail)

Jocelyn G. Boyd, Esquire
Staff Attorney
S. C. Public Service Commission
Post Office Box 11649
Columbia, South Carolina 29211
(PSC Staff)
(U. S. Mail and Electronic Mail)

Joseph Melchers
Chief Counsel
S.C. Public Service Commission
Post Office Box 11649
Columbia, South Carolina 29211
(PSC Staff)
(U.S. Mail and Electronic Mail)

John J. Pringle, Esquire
Ellis Lawhorne & Sims, P.A.
Post Office Box 2285
Columbia, South Carolina 29202
(NewSouth, NuVox, KMC, Xspedius)
(U. S. Mail and Electronic Mail)

John J. Heitmann
Stephanie Joyce
Garrett R. Hargrave
KELLEY DRYE & WARREN LLP
1200 Nineteenth Street, N.W., Suite 500
Washington, D.C. 20036
(U. S. Mail and Electronic Mail)

Nyla M. Laney

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